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IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No. [redacted] 92

JOSEPH NISONOFF,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF.

ALSO:

PETITION FOR DIMINUTION OF RECORD

LOUIS B. BOUDIN,
Of Counsel for Petitioner.

INDEX

PETITION:

A—Statement of the Matter Involved 1

B—The Question Presented 3

C—Reasons Relied On for Allowance of Writ 4

BRIEF:

POINT I—The case involves rights guaranteed by the United States Constitution 6

POINT II—The matter involved is of the highest public interest and importance 7

POINT III—The document in question and the legal provisions under which it was prepared and kept 7

POINT IV—Judicial construction of the statutory provisions covering the document in question 9

POINT V—The decision sought to be reviewed is clearly erroneous and in conflict with the decisions of this Court construing this provision of the United States Constitution as well as with the decisions of the English courts construing the same fundamental right under the common law 11

A. The right of confrontation is a fundamental right of due process which exists independent of specific constitutional provisions 11

B. The right of confrontation is preserved by the Constitution to the full extent that it existed in England and in this country at the time of the adoption of the Constitution 13

PAGE

C. There is no exception to the rule of confrontation in favor of the admissibility of public records 16

D. The document in question is not recognized as a public record by the laws of the State of New York and has none of the essentials of a public record 17

E. The modern enlargements of the exception of the hearsay rule refer only to matters the falsity of which could be proved 23

F. Reports of coroners' inquests have always been excluded as hearsay 24

G. The enlargement of the exceptions to the hearsay rule in favor of public documents has never been held to extend to matters involving judgment, skill or accuracy of perception 25

POINT IV—The *Slavski* case furnishes no authority for the decision sought to be reviewed 26

POINT V—The *Slavski* case is a warning 30

CONCLUSION 32

APPENDIX A 33

APPENDIX B 39

PETITION FOR DIMINUTION OF RECORD 43

CASES CITED

	PAGE
Brown v. Mississippi, 297 U. S. 278	7
Chambers v. Florida, 309 U. S. 227	7
Commonwealth v. Slavski, 245 Mass. 405, 417	26, 29, 30, 32
Cudahy Packing Co. v. United States, 15 F. (2d) 133, 135-136	21
English v. Bohan, Matter of, 175 Misc. 930	10, 11, 17
Ferguson v. Clifford, 37 N. H. 86, 95	20
Heike v. United States, 192 Fed. Rep. 83	25, 26
Malinski v. People, —— U. S. ——, 89 L. Ed. Adv. Op. 738	7
Mattox v. United States, 156 U. S. 409	13, 14, 16
Moore v. Dempsey, 261 U. S. 86	6
People v. English, 175 Misc. 751	10, 17
People v. Jackson, 191 N. Y. 292	25
Powell v. Alabama, 287 U. S. 45	6
Senior v. Boyle, Matter of, 221 N. Y. 414, 416-417	10
Sturla v. Freccia, 5 App. Cas. 623	18
White v. Texas, 310 U. S. 530	7
Ziegler, Matter of, 122 Misc. 351, 353	10, 17

OTHER AUTHORITIES CITED

New York City Charter:	
Section 874	7
Section 1571-c	8, 17
Section 879 of Chapter 39	8
New York City Administrative Code:	
Section 878-3.0	8
New York Constitution	12
Bouvier's Law Dictionary	20, 22

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JOSEPH NISONOFF,

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against

THE PEOPLE OF THE STATE OF NEW YORK.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, JOSEPH NISONOFF, respectfully prays that a *writ of certiorari* issue to review the decision of the Court of Appeals of the State of New York, affirming an order of the Appellate Division of the Supreme Court of the State of New York, in and for the First Department, which said last-mentioned order affirmed a judgment of the County Court of the County of Bronx, in the State of New York, convicting your Petitioner of manslaughter in the first degree.

A

Statement of the Matter Involved

I. Petitioner, a physician, and another physician named Max J. Weinstein, were indicted jointly by an indictment filed in the County Court of the County of Bronx, State

of New York, on December 1, 1942, charging them with the crime of manslaughter in the first degree, in that they had wilfully and feloniously used and employed a certain instrument upon the person of one Madylon McGeehan, a woman pregnant with child, with the intent to procure a miscarriage, and by the use of such instrument inflicted injuries resulting in her death, contrary to the statutes of the State of New York.

The case came on for trial before a Judge of the County Court and a jury, and was tried from March 3 to March 31, 1943, and resulted in a conviction of both physicians; whereupon Petitioner was sentenced to imprisonment for a term of not less than five years nor more than fifteen. The conviction was affirmed by the Appellate Division of the Supreme Court of the State of New York, in and for the First Department, and a further appeal to the Court of Appeals of the State of New York resulted in the decision sought to be reviewed. This decision was rendered on December 30, 1944, and a remittitur containing the decision was thereupon sent by the Court of Appeals to the County Court of the County of Bronx, in accordance with the practice of the State of New York. Thereupon a motion was made by Petitioner in the Court of Appeals to recall the said remittitur, and to have the same amended so as to show that a constitutional question under the Constitution of the United States had been raised, considered and necessarily passed upon by the Court of Appeals. The said motion was granted, the remittitur recalled, and after such recall the remittitur was duly amended to show such fact. The amended remittitur is dated January 16, 1945. A motion was thereupon made for a reargument of the decision on the merits. This motion was denied by an order of the Court of Appeals made March 1, 1945.

II. During the trial, and in order to prove the cause of death, the prosecution offered in evidence the report of an Assistant Medical Examiner of the City of New York

of his findings in the course of an autopsy on the body of the deceased,—the said Assistant Medical Examiner having died in the meantime. The said report was objected to by counsel for your Petitioner as in violation of the right of confrontation guaranteed by both the Constitution of the State of New York and the Constitution of the United States. The said objection was overruled and the report admitted into evidence.

Thereupon, another physician was called and permitted to testify as an expert on the basis of the report made by the Assistant Medical Examiner thus admitted in evidence, as to the cause of death. This question, that is to say, whether the admission of the said report was in violation of the constitutional guarantee of confrontation,—was the only question considered by the Court of Appeals in its opinion accompanying its decision affirming the conviction. The said opinion is annexed as Appendix A to the accompanying brief. The amended remittitur of the Court of Appeals contains the following statement:

> "A question under the constitution of the United States was presented and necessarily passed upon. The appellant contended that the receipt in evidence of the medical examiner's report and the testimony as to the cause of death based thereon violated the due process provision of the Fourteenth Amendment of the Constitution of the United States. This court held to the contrary."

B

The Question Presented

The sole question presented is:

Did the admission into evidence of the report of the Assistant Medical Examiner of the City of New York of his alleged findings during the autopsy performed upon the body of Madylon McGeehan as showing the cause of death, or as a basis for an expert opinion as to the cause

of death of the said Madylon McGeehan, violate the right of confrontation guaranteed to your Petitioner by the Sixth and Fourteenth Amendments to the United States Constitution?

C

Reasons Relied on for Allowance of Writ

The question presented is one of the fundamental rights under the Constitution of the United States and the Articles of Amendments thereof. The right involved, guaranteed by the Sixth Amendment, is one of the basic rights made applicable to trials in state courts by the Fourteenth Amendment. The right has been frequently affirmed by this Court as one of the basic rights guaranteed by the Sixth Amendment; and the applicability of the provisions of the Sixth Amendment with respect to such basic right has been frequently applied by this Court in recent cases to trials in state courts. But the exact question involved in this case has never been passed upon by this Court. And a search of the adjudicated cases would indicate that the particular question has never before been presented to any court as the particular invasion seems never to have been attempted before.

The question presented, therefore, is one of great public interest, in that it is of great importance in the administration of the criminal laws in both the Federal courts and the tribunals of the different States of our Union, and in the safeguarding of the liberties guaranteed by the United States Constitution to those accused of crime.

Your Petitioner therefore verily believes that the application presents a case cognizable by this Honorable Court under the Constitution and statutes of the United States and the rules of this Honorable Court, and one eminently proper for review by this Honorable Court.

WHEREFORE, your Petitioner respectfully prays that a *writ of certiorari* be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals of the State of New York, commanding that Court to certify and to send to this Court for its review a full and complete transcript of the record of all proceedings in said suit, proceeding or matter, and to stand to and abide by such order and direction as your Honorable Court shall deem meet and the circumstances of the case require, and that your Petitioner may have such other and further relief or remedy in the premises as to this Honorable Court may seem just and proper.

Dated, New York, May 25, 1945.

LOUIS B. BOUDIN,
Of Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No. .....

JOSEPH NISONOFF,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

POINT I

The case involves rights guaranteed by the United States Constitution.

The question of confrontation which is involved in this case is guaranteed by the Sixth Amendment to the Constitution of the United States. This Court has frequently held that the right of confrontation, involving as it does the right of cross-examination, is a fundamental right. And in recent years this Court has frequently held that the fundamental rights guaranteed by the Sixth Amendment to persons accused of crime are guaranteed to persons accused of crime when tried in the state courts by the Due Process Clause of the Fourteenth Amendment.

Moore v. *Dempsey*, 261 U. S. 86;
Powell v. *Alabama*, 287 U. S. 45;

Brown v. *Mississippi*, 297 U. S. 278;
Chambers v. *Florida*, 309 U. S. 227;
White v. *Texas*, 310 U. S. 530;
Malinski v. *People*, U. S. , 89 L. Ed. Adv. Op. 738.

POINT II

The matter involved is of the highest public interest and importance.

Needless to say, also, the matter is of the greatest public interest and importance, since it involves the basic rights of every person in the United States accused of crime. Importance is added to the question by the fact that this is the first time, as far as we have been able to ascertain, that a question of this character has arisen in any court. The decision of the Court of Appeals of the State of New York is therefore likely to become the law of the land on a matter involving the Federal Constitution unless reversed by this Court. It is therefore of the greatest importance that this Court examine this question at this time in order to make sure that an erroneous construction of the United States Constitution on a matter of fundamental rights be not imbedded in our law by an accumulation of decisions in other courts, upon the authority of this decision, before this Court has passed upon the question.

POINT III

The document in question and the legal provisions under which it was prepared and kept.

Section 874 of the New York City Charter reads in part as follows:

"There shall be the office of chief medical examiner the head of which shall be the chief medical examiner

> who shall be appointed by the mayor from the classified civil service and be a doctor of medicine and a skilled pathologist and microscopist * * *."

Another section of the Charter provides for the appointment of Assistant Medical Examiners, who shall have the same qualifications as the Chief Medical Examiner. Both the Chief and the Assistant Medical Examiners are required to take the usual oath of office.

Section 1571-c of the Charter provides in part as follows:

> "It shall be the duty of the office of medical examiner to keep full and complete records. *Such records* shall be kept in the office, properly indexed, stating *the name,* if known, of every such person, *the place* where the body was found and *the date* of death. *To the record* of each case shall be *attached the original report* of the medical examiner and the detailed findings of the autopsy, if any. The office shall *promptly deliver* to the appropriate district attorney copies of all records relating to every death as to which there is, in the judgment of the medical examiner in charge, any evidence of criminality." (Emphasis supplied throughout unless otherwise stated.)

Section 879 of Chapter 39 of the New York City Charter provides:

> "It shall be the duty of the chief medical examiner to keep full and complete records in such form as may be provided by law. The chief medical examiner shall promptly deliver to the appropriate district attorney copies of all records relating to every death as to which there is, in the judgment of the medical examiner in charge, any indication of criminality, *and such records shall not be open to public inspection.*"

Section 878-3.0 of the Administrative Code of the City of New York provides:

> "If the cause of such death shall be established beyond a reasonable doubt, the medical examiner in charge

shall so report to his office. If, however, in the opinion of such medical examiner, an autopsy is necessary, the same shall be performed by a medical examiner. A detailed description of the findings written during the progress of such autopsy and the conclusions drawn therefrom shall thereupon be filed in his office."

The document in question was prepared in the presence of two police officers, and occupies more than three pages of the printed record. It is printed as Appendix B of this brief. As will be noticed upon examination, it is composed mainly of all kinds of expressions of opinion and estimates of size, measurements, color, texture, consistency, origin, etc. It fairly bristles with such terms and expressions as "natural", "normal", "loose", "firm", "soft", "faint", "moderate", "considerable", "readily", "irregular", "pale", "cloudy", "mangled", "congested", "dilated", "denuded", "distended", "fibroid", "necrotic", "*bile*-stained", "*blood*-tinged", "haemmorhagic fluid", "*surgical* incision", "*deeply* congested", "*markedly* oedematous", "*moderately* soft".

POINT IV

Judicial construction of the statutory provisions covering the document in question.

The New York Court of Appeals has held that although the office of Medical Examiner of the City of New York is a substitute for the ancient office of Coroner, the new office has none of the essential characteristics of the ancient office. *It is not a judicial office.* It is part of the investigating machinery set up in connection with the prosecution of crime,—its special function being to determine whether there is any evidence upon which to base a conclusion that a deceased has come to his death by criminal means.

"The duty of such chief medical examiner and his assistants is *to investigate* the circumstances of all

violent and suspicious deaths and to file a written report thereof in his office and to make autopsies if necessary * * * But the characteristic features of the office and power of a coroner (Code of Crim. Pro., Secs. 773-790) are not retained. The chief medical examiner acts without a jury, holds no inquest, renders no decision, holds no one to answer, issues no warrant of arrest. The ancient office is gone and the ancient duties have largely disappeared with it. *Another method of investigating suspicious deaths* has supplanted crowner's quest."

Matter of Senior v. *Boyle,* 221 N. Y. 414, 416-417.

The New York courts have also held that the autopsy report *is not a public record,* and cannot therefore be corrected or amended by an order of a court upon a showing of error in its contents.

"Sections 1571, 1571-a, 1571-b, 1571-c and 1571-d of the charter prescribe the procedure, duties and powers of the chief medical examiner in relation to violent and suspicious deaths * * *. The reports of the police department made by police officers are not public records. (Cit. cas.) * * * They are essentially confidential, relating to the apprehension and prosecution of criminals. *This also is true of the records of the office of the medical examiner.*"

Matter of Ziegler, 122 Misc. 351, 353.

Because of the fact that the Medical Examiner's office is considered part of the machinery of the prosecutor's office, the New York courts have held that the report of the Medical Examiner is not only not open to public inspection, *and that a person charged with crime has no right to examine the same, and that the courts have no power to direct its disclosure to counsel for the accused.*

People v. *English,* 175 Misc. 751;
Matter of English v. *Bohan,* 175 Misc. 930.

In the last case cited the Supreme Court of the State of New York said:

> "This petitioner seeks an order directing a judge of the Court of General Sessions to issue an order permitting the petitioner to inspect the autopsy record of the death of one Paul English * * *.
>
> The papers reveal that Novella English was indicted in the Court of General Sessions for manslaughter in the first degree for killing Paul English. Previously, *a motion was made for this basic relief in that court and denied.* That determination was adhered to upon motion for reargument * * *. The statute that is controlling is section 879 of the New York City Charter. Here we have a charge of the crime of manslaughter in the first degree. The chief medical examiner, pursuant to his duty, found evidence of criminality and delivered the autopsy record to the district attorney of New York county. *This statute says that 'such records shall not be open to public inspection'* * * * *It necessarily follows that the Court of General Sessions was correct in its ruling.*"

Matter of English v. *Bohan*, 175 Misc. 930, 931.

POINT V

The decision sought to be reviewed is clearly erroneous and in conflict with the decisions of this Court construing this provision of the United States Constitution as well as with the decisions of the English courts construing the same fundamental right under the common law.

A

The right of confrontation is a fundamental right of due process which exists independent of specific constitutional provisions

The right of confrontation, involving as it does the right of cross-examination, is one of the fundamental rights which existed at common law and still exists inde-

pendent of specific constitutional provisions. It existed in England and in this country prior to the adoption of the United States Constitution, and is still a part of the English common law as well as of the common law of every state of our Union. It is true, of course, as suggested by the New York Court of Appeals, that the various state legislatures would, but for the provisions of the United States Constitution, be free to infringe upon this right. But, we take it, that in the absence of specific legislative enactment changing the common law in this respect no state court would consider itself free to infringe upon this right, even in the absence of specific constitutional prohibitions. And the recent amendment to the New York Constitution shows that the people are alert to such possible infringements and intent upon the preservation of this right and its protection against infringement by either legislature or courts. Without inquiring into the question as to which branch of their government has brought the people of the State of New York to a realization of the danger, in so far as the omission in their own Constitution was concerned, it is sufficient to point to the fact that they have found it necessary or expedient to amend their Constitution in 1938 by inserting into that document the following provision:

> "No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land, air and naval forces in time of war, or which this state may keep with the consent of Congress in time of peace, and in cases of petit larceny, under the regulation of the legislature), unless on indictment of a grand jury, and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation *and shall be confronted with the witnesses against him.*"

Indeed, neither the fundamental character of the right involved, nor of the necessity for care in its preservation, was denied by the New York Court of Appeals. Its decision proceeded upon the theory that the introduction of the document in question was permissible under the common law as it existed at the time of the adoption of the Sixth Amendment (in so far as the United States Constitution was involved) and was therefore not an infringement of the same. This claim is based on the assumption that the document in question was a "public record",—which is supposed to constitute an exception to the rule of confrontation at common law. But that assumption is clearly erroneous.

B

The right of confrontation is preserved by the Constitution to the full extent that it existed in England and in this country at the time of the adoption of the Constitution

In the leading case of *Mattox* v. *United States* (156 U. S. 409) this Court held that the protection of the constitutional provision of confrontation is secured to the people of the United States by the Sixth Amendment to the full extent that it existed in England and in this country at the time of the adoption of the Constitution. It is true that in that case the Court held that the constitutional provision is satisfied with *one full confrontation,* and a conviction at a second trial may be had without *further* confrontation, in a case where further confrontation is impossible; but, as the opinion of the Court shows, that was meant to be a modification of the rule, but its interpretation as it existed at the time of the adoption of the Constitution. That case involved the admission at a new trial of the sworn testimony of a witness at a former trial who had died in the meantime. In holding such testimony admissible, this Court assimilated the situation to the ancient exception in favor of dying declarations, which the law had always held a fair substitute for confronta-

tion, because of the consciousness in the dead witness' mind of his impending appearance before the Supreme Judge. The Court referred to the opinion of Chief Justice Fuller in delivering the opinion of this Court on an earlier appeal in the same case. On that occasion Mr. Chief Justice Fuller, speaking for a unanimous Court, said, in explaining the reason for the dying declaration rule as it existed at common law:

> "The point is to ascertain the state of the mind at the time the declarations were made. The admission of the testimony is justified upon the ground of necessity, and in view of the consideration that the certain expectation of almost immediate death will remove all temptation to falsehood and enforce as strict adherence to the truth as the obligation of an oath could impose. But the evidence must be received with the utmost caution, and if the circumstances do not satisfactorily disclose that the awful and solemn situation in which he is placed is realized by the dying man because of the hope of recovery, it ought to be rejected."
>
> *Mattox* v. *United States*, 146 U. S. 918, 922.

And in giving the reasons for its decision in the second *Mattox* case this Court said:

> "Upon the trial it was shown by the government that two of its witnesses on the former trial, namely, Thomas Whitman and George Thornton, had since died, whereupon a transcribed copy of the reporter's stenographic notes of their testimony upon such trial, supported by his testimony that it was correct, was admitted to be read in evidence. Both these witnesses were present and were fully examined and cross-examined on the former trial. It is claimed, however, that the constitutional provision that the accused shall 'be confronted with the witnesses against him' was infringed, by permitting the testimony of witnesses sworn upon the former trial to be read against him. No question is made that this may not be done in a civil case, but it is insisted that the reasons of convenience and necessity which excuse a departure from

the ordinary course of procedure in civil cases cannot override the constitutional provision in question * * *.

The rule in England, however, is clearly the other way (cit. cas.). As to the practice in this country, we know of none of the states in which such testimony is now held to be inadmissible * * *. In the case of *State* v. *Campbell*, 1 Rich, L. 124, *the testimony of a deceased witness had been taken before a coroner, but in the absence of the accused, and of course it was held to be inadmissible.*

Upon the other hand, the authority in favor of the admissibility of such testimony, where the defendant was present either at the examination of the deceased witness before a committing magistrate, or upon a former trial of the same case, is overwhelming * * * The subject was also treated at great length by Judge Drummond in *United States* v. *Macomb*, 5 McLean 286, and the substance of a deceased witness' testimony given at a preliminary examination held to be admissible. All the cases up to that time were cited in the opinion, and the decision put upon the ground that, *the right of cross-examination having once been exercised, it was no hardship upon the defendant to allow the testimony of the deceased witness to be read* * * *.

The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards even by the death of the witness; and that, if notes of his testimony are permitted to be read, he is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection * * *.

We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted,

not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject—such as his ancestors had inherited and defended since the days of Magna Charta. Many of its provisions in the nature of a bill of rights are subject to exceptions, recognized long before the adoption of the Constitution, *and not interfering at all with its spirit.* Such exceptions were obviously intended to be respected. * * *.

The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. *This, the law says, he shall under no circumstances be deprived of* * * *."

Mattox v. *United States,* 156 U. S. 237, 240-244.

C

There is no exception to the rule of confrontation in favor of the admissibility of public records

The decision of the New York Court of Appeals proceeds upon the theory that there was at common law an exception to the rule of confrontation in favor of the admissibility of public records, and that the document here in question was a "public record". We shall see further below that under no possible theory can the document in question be considered a public record. But at this point we desire to respectfully suggest that the only exception to the confrontation rule known to the common law was that of dying declarations. There was no such exception at common law, as far as we are aware, in favor of public records. We have been able to find no English case in which such an exception to the rule of confrontation is recognized. Nor have we been able to find a case in this country, in which it was held that there was such an exception to the rule of confrontation at common law, either in England or in this country, at the time of the adoption of the United States Constitution.

D

The document in question is not recognized as a public record by the laws of the State of New York and has none of the essentials of a public record

(1) *Neither the statute itself nor the decisions of the Court dealing directly with the subject recognized the document as a public record.*

The first thing to be noted about the document is that the statute under which it was prepared *does not recognize it as a public record.* An examination of Section 1571-c of the Greater New York Charter quoted above will disclose that the statute itself pointedly differentiates between the "records" which it provides *should be kept* and the report of the Medical Examiner which is to be transmitted to the District Attorney. The "records" to be kept, says the statute, must contain the *name* of the deceased, the *place* where the body was found and the *date* of death. That is all the "record" that the law provides should be made and kept by the Medical Examiner's office. It then proceeds to say that "to the record of each case" "shall be attached" the original report of the Medical Examiner and the detailed findings of the autopsy, if any. It is thus clear that the statute provides for two things: A "record" limited by the statute itself to what such records usually contain—namely, name, date and place. And a Medical Examiner's "report" is no part of the "record". The "report" not being part of the "record", is, therefore, to be "attached to" the copy of the "record" when the same is transmitted to the District Attorney. It is because of these provisions, as well as the provisions for secrecy, that the courts of the State of New York have held, in all the cases in which the question was directly involved, that the Medical Examiner's report is not a "public record".

People v. *English*, 175 Misc. 751;
Matter of English v. *Bohan*, 175 Misc. 930;
Matter of Ziegler, 122 Misc. 351.

(2) *An examination of the common law as revealed by the adjudicated cases in England and in this country as to the state of the law at the time of the adoption of the Sixth Amendment shows that in order to constitute a "public record" within the exception to the hearsay rule, the document had to answer a three-fold test, in addition to being made by a public functionary in the discharge of a public duty:* (*a*) *the purpose had to be that of making a permanent record for future reference;* (*b*) *it had to be open for public inspection; and* (*c*) *it had to be in the nature of a registry of facts in themselves of a neutral character, in the sense that it had no other interest to the recording official than that of making a record of public events, such as births, deaths or marriages, recorded serially.*

(a) The common law as it existed in England at the time of the adoption of the Constitution, *and as it is still enforced by the courts of England today,* was thus stated by Lord Blackburn and Lord Watson in the much-cited case of *Sturla* v. *Freccia* (5 App. Cas. 623), decided by the House of Lords in 1845:

> "Lord Blackburn: I think as far as my recollection goes, although I will not pledge myself to its accuracy, and so far as I have ever heard anything cited, it will be found that, in every case in which a public document of that sort has been admitted, it has been made originally *with the intent that it should be retained and kept as a register referred to, ever after.*"
>
> "Lord Watson: My Lords, I cannot conceive when you take these circumstances into consideration along with the undoubted fact that this was not made for the purpose of being recorded in a public register that it can have the authority of a public register. No doubt the document survives, but the mere fact that a document intended for a temporary purpose of this kind, is found, after a long lapse of years in the archives of a Government office, does not constitute it of the authority of *a register.* The purpose of this document was ephemeral, and was at an end the moment the appointment was made."

And Lord Blackburn, after stating that a document, in order to be admissible as a "public record" within the exception to the hearsay rule, must be intended to "be retained and kept as a register referred to, ever after", proceeded to state in so many words that a temporary and confidential report, even though made on the highest authority, thus importing absolute verity, was not within that exception. Said he:

> "Supposing"—said Lord Blackburn—"this inquiry had been carried on under the authority of the English Crown, and the English Crown had required of a magistrate that some confidential report should be made, it is not to be public in one sense, but it would be public in this sense, that it would concern the Crown, and, from common respect for the Crown, one would suppose that what the magistrates told the Queen would be what they firmly believed and considered they had good reasons for believing, but I do not think it would come within the sense and meaning of the rule that a public document would be admissible as evidence on the ground that a public officer, in making the statement for the public, was likely to speak the truth and must be presumed, *prima facie*, to have known and to have spoken the truth. *I am not aware of any decision which says that, in such a case as I have supposed, the document would be received. I do not believe anyone has ever tried to put in such a document and therefore I do not think there is or can be any authority to the contrary.*"

What Lord Blackburn said with respect to the condition of the adjudicated cases in England in his time is also true of the state of the adjudicated cases in this country at that time. It will, we take it, be conceded that that is still the law in England, exactly one hundred years after the *Sturla* case was decided. It is claimed, however, that the rule has been changed by later decisions in this country. It is unnecessary to enter here upon a long inquiry as to whether that contention is true,—although we are confident that an examination of the cases in this country which are

usually referred to in this connection will not bear out the contention sufficiently to affect the present case, even if it were a civil suit in which the only question involved were the state of the law with respect to the hearsay rule. Such examination is not necessary because, concededly, the inquiry here is not whether the courts of this country have recently seen fit to modify the common law with respect to the hearsay rule, but whether such a modification of the hearsay rule derogates from the constitutional guarantee of confrontation. The condition of the common law of this country as late as 1858 was thus stated by the Supreme Court of New Hampshire:

> "*Official registers*, or books kept by persons in public office, in which they are required to write down particular transactions, or to enroll or record particular contracts or instruments, are generally admissible in evidence, notwithstanding their authenticity is not confirmed by those usual and ordinary tests of truth—the obligation of an oath and the power of cross-examining the persons on whose authority their proof and authenticity may depend. *This has been said to be, because they are required by law to be kept, because the entries in them are of public interest and notoriety, and because they are made under the sanction of an oath of office or in the discharge of an official duty.*"
>
> *Ferguson* v. *Clifford*, 37 N. H. 86, 95.

Bouvier's Law Dictionary defines "record" as a "written *memorial* made by a public officer authorized by law to perform that function, and intended to serve as evidence of something written, said or done." But not only does the meaning of the word "record" import permanency in the sense of being a "memorial". It had also to be part of a *series* of entries made in the usual course of official business,—and the fact of its being part of a series was one of the elements which insured its correctness, as distinguished from something made *ad hoc*. That the word "records" is intended to apply only to a series of entries,

as contrasted with some "memorandum" made *ad hoc,* is clear from all the cases dealing with the subject of the hearsay rule. It is also clear from cases in other fields. So it was held in a recent case that there is a clear distinction between "records" and "documents", and that where a statute gave the right of inspection of the one it did not include the inspection of the other. In that case a Federal statute gave the Federal Trade Commission the right to inspect "documents, papers and correspondence", and the Court held that "documents" did not include "records". In the course of its opinion the Court said:

> "Generally speaking, the words 'documents' and 'papers' refer to particular instruments and writings bearing upon specific transactions, as deeds, contracts, plans, specifications, instruments, and writings generally of that nature, whereas 'books of accounts' and 'records' have reference to *serial,* continuous and more permanent *memorials of a concern's business and affairs, chronologically and systematically kept and arranged.*"
>
> *Cudahy Packing Co.* v. *United States,* 15 F. (2d) 133, 135-136.

It is thus clear that the first requisite of a "public record" is that it should be *a record,*—i.e., *something intended to be kept for future general reference,* and not something prepared for a temporary, special or an "ephemeral" purpose, the use of which ends with the matter immediately in hand.

(b) The same cases clearly demonstrate that in addition to its being a "record", intended for permanent reference, it must also be "public", in the sense that it was intended for *public use* and therefore *accessible to the public,*—so that those who are interested may consult it. As Lord Blackburn said: "• • • *so that the persons concerned in it may have access to it afterwards.*"

That the right of inspection was an essential prerequisite of a public document being a "record" is shown by the following comment in Bouvier's Law Dictionary:

> "At common law, there was no general right of inspection, but the right depended entirely upon the question whether the party seeking to exercise it had an interest. *If he had, he was entitled to exercise the right* upon the payment of the usual fees; but a mere stranger who had no such interest had no right of inspection at common law * * *. At a comparatively early period, this distinction between those who had and those who had not an interest became obliterated. The effect of modern recording acts making the public records notice, has aided to accomplish this result, and, *indeed, makes the right of inspection and of enforcing the privilege an essential one.*"
>
> Bouvier, Law Dictionary, article "Record".

(c) A further examination of the cases in both England and this country will disclose the fact that, at least until a very recent date, a public document had to be of a particular character in order to qualify as a "public record" within the exception to the hearsay rule,—namely, *that it had to be of events of more or less public notoriety, such as births, deaths and marriages.* And, by the same token, the events had to be of a *neutral character* as far as the official making the entry was concerned. The official keeping the record was entering a matter of common knowledge concerning *other people* in a matter in which he himself was not immediately concerned,—he was not recording his own birth or his own marriage, nor, of course, his own death. In short, it had to be, in the language of the New Hampshire case, in the nature of an *"official register"*,—particularly, *not something done with a special purpose in mind.*

Before the modern recording statutes, such registers were strictly limited to matters which were, in the language of the same case, of "public interest and notoriety", at least in their own community. This gave them additional

weight as sources of truthful information, because, as many of the cases point out,—since these matters were of common knowledge and the books were open to public inspection,—any error in the original entry was sure to be subsequently corrected. Our recording statutes have increased the number of things that can be entered upon a "register"; but their admissibility as evidence is strictly a creature of statute and limited to statutory purposes,—which, of course, relate solely to civil suits. Their principal effect is that of constructive public notice which brings them within the reason of the original rule which made public records an exception to the hearsay rule. Of course, even the limited efficacy of such "record" is circumscribed by many statutory provisions intended to safeguard their veracity. And, of course, they have no efficacy whatever in case their fraudulent character can be proven.

E

The modern enlargements of the exception of the hearsay rule refer only to matters the falsity of which could be proved

We further respectfully submit that a careful examination of the modern enlargements of the exception to the hearsay rule in favor of public documents, whether by statute or by judicial innovation, are limited to cases in which the document, if false, is susceptible of contradiction and therefore to disproof. The statutes and decisions therefore limit the enlargement of the exception to making the documents only *prima facie* evidence. But the limitation of *prima facie* is utterly inapplicable to a case like *an autopsy performed in secret,* such as that involved in the case at bar. A suit may, of course, always be lost because of inability to produce evidence to offset erroneous or false testimony. *But in this case the person affected was barred from obtaining any evidence of the event.*

The law under which the autopsy was held and the document prepared excluded him from viewing the "documented" event, and even from inspecting the document itself, or from correcting an error if by chance it should become known to him.

We respectfully submit that such a document would not be permitted in a civil suit under any "enlargement" of the exception to the hearsay rule. *It certainly cannot be permitted in the face of the constitutional guarantee of confrontation in a case in which there never was an opportunity for cross-examination,—an essential requirement of due process in every civilized community.*

F

Reports of coroners' inquests have always been excluded as hearsay

The reports of coroners' inquests have concededly been held to be hearsay, and excluded as such when an attempt was made to introduce them. This notwithstanding the fact that coroners performed judicial functions, and the coroner's inquest was a judicial proceeding. The reason is obvious: Even under the old coroner's procedure, the proceeding was sometimes *ex parte,* and where the defendant was present he did not have all of the rights and privileges usually accorded to an accused in a criminal prosecution. The report of the coroner was not a "public record" as understood at common law, the coroner being part of the prosecuting machinery of the state.

Prosecuting officials act, of course, under oath. But that does not mean that District Attorneys or other officials concerned in the prosecution enjoy special privileges with respect to their private findings or decisions. Indeed, notwithstanding their official oath of office, they frequently act in a partisan manner and their testimony should be specially scrutinized. They are frequently carried away by their zeal to do things which the courts have held not in consonance with their official duties, as the reports of

adjudicated cases show. And it so happens that the reported cases of the State of New York contain a case where a coroner was convicted of the crime of bribery in connection with his official judicial duties as coroner.

People v. *Jackson,* 191 N. Y. 292.

This does not, of course, indicate that coroners are particularly given to violating their oath of office. But it shows that the matters coming before them, and their successors the medical examiners, *are not of the kind in which reliance can be had on the oath of office alone.*

This is particularly true of an autopsy conducted under legal provisions such as obtain in New York City, in which, from the nature of the case, *a false or erroneous finding could not possibly be detected or contradicted.*

G

The enlargement of the exception to the hearsay rule in favor of public documents has never been held to extend to matters involving judgment, skill or accuracy of perception

We further respectfully submit that there is no case to be found in which the "enlarged" exception to the hearsay rule in favor of public documents has ever been applied, even in a civil case, to matters involving judgment, skill or accuracy of perception. And all sound reasoning is against it. Even Professor Wigmore, whose antipathy to the hearsay rule is well known, has never advocated such "enlargement". We are not speaking, of course, of cases where the official judgment itself is a matter to be proven. Coroner Jackson's judgment or decision in the inquest conducted by him could, of course, be proven when he was prosecuted for bribery in making that judgment or decision.

The only case in the Federal courts which has been called to our attention (*Heike* v. *United States,* 192 Fed. Rep.

83) in which a "public record", other than that of such matters of "public notoriety" as births, deaths and marriages was admitted in evidence, was that of a public weigher. Aside, therefore, from the other factors in that case which differentiate it from our case,—such as that the weigher was not part of the prosecuting machinery and the matter was of complete indifference to him, and the weighing was done in public and in the presence of the representative of the accused,—the matter involved was one of mechanical measurement which did not require any particular skill or accuracy of perception. Nor, of course, did it involve any judgment as to origin or cause and effect. The same is true of the *Slavski* case, heavily relied on by the New York Court of Appeals. This matter can therefore be best discussed in connection with that case, to the examination of which we shall now proceed.

POINT IV

The *Slavski* case furnishes no authority for the decision sought to be reviewed.

Before examining the case itself it should be noted that the *Slavski* case was decided largely on the authority of Mr. Wigmore's opinion that the rule as enforced in England was unsound, and that the modern tendency in the courts of this country was to get away from it. We have already indicated that Mr. Wigmore's opinion with respect to the current of decisions in this country is more in the nature of a wish than a fulfillment. However, this is immaterial in the present case, since Mr. Wigmore nowhere suggests that the kind of document with which we are dealing here would be admissible even in a civil suit, and the *Slavski* case itself does not so hold.

The *Slavski* case was a prosecution under a state law dealing with the traffic in intoxicating liquors. The state statutes provided that when intoxicating liquors are con-

fiscated under the law a sample should be sent to a laboratory conducted by the Department of Public Health, as part of its general business of taking care of the health of the community, for analysis and certification as to alcoholic content; and the question in the case was whether the admission of such certificate, under a statutory provision which made it admissible as *prima facie* evidence, violated the constitutional guarantee of confrontation. The decision was that the confrontation rule was not thereby violated. At this point we are not concerned in the question whether that decision was sound or unsound, but with an analysis of its meaning and the extent to which it went in departing from settled rules as to the constitutional guarantee involved.

That its decision was a departure from settled notions on the subject is conceded by the Court making the decision. But the Court justified its decision on the theory that it did not in fact violate any rule flowing from the basic ideas underlying the constitutional guarantee. In doing so the Court did not discuss the well-settled distinction between "records" and "documents", but rather proceeded upon the theory that the two are convertible terms. It then suggested that the legislature, in providing that the certificate should be made and that it could be used in evidence, was really *protecting the interests of the accused* as much as those of the public, by providing for a scientific test by a *disinterested agency, not part of the prosecuting machinery,*—the analysis being at the disposal of the accused as well as of the prosecution.

The document in question was a "public" one, at least in the sense that it was made for the use of all those who may be concerned or have an interest therein. And it met the requirement that it should be made by a person entirely disinterested in the matter. It offended the requirement of seriality and was made *ad hoc*. But the Court met that partly by the suggestion that it was made for the defendant's own benefit and partly pointing to the nature of the matter itself,—namely, *that it did not involve anything*

dependent on opinion, judgment, or quickness of perception. Said the Court:

"One of the acknowledged exceptions to the face to face rule of evidence is that public records are competent evidence with all probative value respecting an issuable fact. That is an essential principle of the common law recognized at the time of the adoption of the Constitution. It cannot be thought that the Constitution was intended to close the door to the legislative department of the government to establish new public records with like probative value. Existing public records did not become rigid for all time for evidential purposes. Power to add to the varieties of public records under the principles of law prevailing at the time of the adoption of the Constitution is conferred on the General Court under the grant to make, ordain and establish all manner of wholesome and reasonable laws not repugnant to the Constitution. There is analogy in this respect to the trial by jury preserved in all its essentials by the Constitution, which may be regulated by the legislature as to details not impairing its essential integrity * * *.

The principle which seems fairly deducible from them (the decisions) is that a record of *a primary fact,* made by a public officer in the performance of an official duty is or may be made by legislation *prima facie* evidence as to the existence of that fact, but that records of *investigations and inquiries* conducted, either voluntarily or pursuant to requirement of law, by public officers *concerning causes and effects involving the exercise of judgment and discretion, expressions of opinion,* and making conclusions are not admissible in evidence as public records. * * *

The determination of the percentage of alcohol in liquor at a specified temperature is the ascertainment of a fact by well recognized scientific processes. *Chemical action* and measurement in such an analysis *do not depend in general upon the quickness of apprehension,* retentiveness of memory, temperament, surmises or conjectures, of the individual. The admission in evidence of the record of such a fact made by a public officer pursuant to statutory obligation would be as likely to be correct as many of the public records

> which have been held to be admissible. There would seem to be as little likelihood of variation of result in such an analysis between different chemists as in the observation of the weather, enumeration of proprietors, or the notation of the weights on scales by other classes of public officers. *The General Court may have felt that it was wise and just with reference to owners of liquor and prospective defendants,* as well as to the general public, to provide for *an impartial analysis by a public officer* in order that the fact of alcoholic content in liquor seized might be established according to *a scientific standard in which confidence might be reposed.*"
>
> *Commonwealth* v. *Slavski,* 245 Mass. 405, 417.

To this should be added the fact that in this case, as in all other cases in which such documents were admitted in evidence, the document was admitted merely as *prima facie* evidence, *and that the conditions were such as would* permit contradiction if it were false. The owner of the liquor knew all about its composition at the time of its confiscation, and so did probably all of his employees. Also, although the opinion in the case does not mention the fact, the liquor itself was probably available and could be produced at the trial, thus furnishing the chance of contradiction of a false certificate, or the correction of an erroneous one. And the owner of the liquor had, of course, an opportunity to take a sample of the same at the time of confiscation and have it analyzed by a laboratory of his own choosing so as to furnish other evidence as well as a basis for checking the correctness of the analysis made by the laboratory of the Department of Public Health. It is because of this situation that the Court assumed that the legislative intent was to protect the owner of the liquor as well as the public in providing for this *impartial* analysis. The thought behind this statement of the Court apparently being that otherwise the jury might possibly be confronted with two contradictory analyses coming from the *interested parties,*—the prosecution on the one hand

and the defense on the other. Clearly, the situation is of an utterly different kind and character from that presented in the case at bar,—where the autopsy was made by a person who was part of the prosecuting machinery, in secret, without the presence of the accused or his representative, *and in a situation where there was no possible way of correcting error or disproving falsehood.*

POINT V

The *Slavski* case is a warning.

The *Slavski* case is clearly no authority for the decision sought to be reviewed; *and there is no other authority for it.* Indeed, *it is contrary to authority as well as our basic conceptions of justice.* It puts a person accused of crime in a position of utter helplessness against a false or erroneous accusation by depriving him of the only means of exposing falsehood and dispelling error, *that of cross-examination.*

But the *Slavski* case should serve as a warning against the departure from those well-tried safeguards which the Constitution throws around persons accused of crime. Let us recapitulate the history of the breakdown of a fundamental constitutional guarantee:

Mr. Wigmore doesn't like the hearsay rule, believing it to be too technical in some of its aspects. He therefore says that certain well known exceptions to the rule ought to be "enlarged"—without, of course, destroying its basic essentials. He also says that there should be no difference in this respect between ordinary rules of evidence which are always subject to change by legislation, and are occasionally changed by the courts, and the constitutional guarantee of confrontation. "Progressive" courts, impatient of technicalities, accept his views in civil cases. Then the decisions in these cases are cited in criminal cases, as if there were no difference between ordinary rules of evi-

dence and constitutional guarantees. A "progressive" court thereupon decides in a comparatively unimportant criminal case that a certificate stating the result of a chemical analysis *probably* intended for the protection of the accused, as well as that of the public, should be admitted in evidence, notwithstanding the confrontation guarantee, because it contains the results of a scientific analysis as to which there could be no differences of opinion, and was made under circumstances in which the rights of the accused were fully protected against error or falsehood. Then comes another court and says that the path of "progress" did not stop with the *Slavski* case: That since the *Slavski* case had held that the constitutional guarantee is no better than an ordinary rule of evidence, the certificate of a Medical Examiner stating the alleged results of an autopsy performed by him in secret, is admissible even though it contains all manner of opinion and is not subject to any scientific test, and renders the accused helpless against error or falsehood.

If anyone who did not give careful thought to the subject were asked whether there was any rational reason for excluding the certificate involved in the *Slavski* case, aside from the constitutional guarantee, one would probably say that there wasn't any. Mr. Slavski probably knew all about the composition of the liquor that he manufactured or sold; was certainly in as good a position as the prosecution for a sample analysis; the analysis was made by an impartial agency, and was of a matter upon which there can be no difference of opinion between honest chemists. Mr. Slavski's interests were not really endangered thereby. The hearsay rule as applicable to this situation was therefore technical. And if it be true that the guarantee of confrontation was only intended to canonize the hearsay rule, we ought to disregard it as "technical". But this disregard of a "technical" aspect of the constitutional guarantee in the *Slavski* case has led to its complete abrogation in the *Nisonoff* case. We need not discuss the question whether

the guarantee must be preserved in all its technical aspects, —for this case involves the essentials of the constitutional guarantee. But the *Slavski* case may stand as a warning against light-hearted infringements of, or encroachments upon, constitutional guarantees. We venture to suggest that the integrity of our constitutional system would have been better served if the *Slavski* certificate had not been admitted. But be that as it may, it is clear that the breach made by the *Slavski* case in the fundamental constitutional guarantee involved must not be permitted to be widened.

CONCLUSION

We respectfully submit that this is a case eminently proper for this Honorable Court to review, so that the serious breach in the constitutional guarantee effected by this case may not remain permanent, and itself serve as a basis for further breaches.

Dated: New York, May 25, 1945.

Respectfully submitted,

Louis B. Boudin,
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APPENDIX A

THE PEOPLE OF THE STATE OF NEW YORK, Respondent

v.

JOSEPH NISONOFF and MAX J. WEINSTEIN, Appellants.

Decided December 30, 1944.

CONWAY, J. The defendants were convicted of the crime of manslaughter in the first degree. The indictment charged that they, acting in concert with another, had willfully and wrongfully used and employed a certain instrument upon a woman pregnant with child, in order to procure a miscarriage, without any necessity to preserve her life and by the use of such instrument inflicted mortal wounds which resulted in her death.

There is but one question presented for our consideration, and that is whether it was error to admit in evidence the autopsy findings of the Assistant Medical Examiner who had died prior to the trial of appellants. That has become important because of a constitutional amendment which became effective on January 1, 1939. Prior to that amendment there would have been no question as to the admissibility of the findings, for the right of the accused to be confronted with the witnesses against him was a matter of statute (Code Crim. Pro., §8; Civil Rights Law, §12), and both the common law and other statutes permitted their introduction in evidence (Civ. Prac. Act, §§367, 374a). By the constitutional amendment of 1938, the right of confrontation was written into article I, section 6. The question is whether that made the autopsy findings inadmissible, in view of the death of the reporting official.

The autopsy was performed on November 18, 1942, by the Assistant Medical Examiner. While he was perform-

ing the autopsy, he dictated his findings to a stenographer and typist attached to the office of the Medical Examiner. They were subsequently transcribed and a report prepared which was signed by the Assistant Medical Examiner and filed in the office of the Medical Examiner. So much of the report as contained the findings was offered and received in evidence. The opinion contained in the report was not offered. The Chief Medical Examiner was called to give opinion testimony as to the cause of death, based upon those findings.

New York City Charter, sections 874, 875, provide that an Assistant Medical Examiner must be a "doctor of medicine and a skilled pathologist and microscopist". It has not been argued here that the Assistant Medical Examiner did not possess those statutory qualifications.

Section 879 of the Charter provides: "It shall be the duty of the chief medical examiner to keep full and complete records in such form as may be provided by law. The chief medical examiner shall promptly deliver to the appropriate district attorney copies of all records relating to every death as to which there is, in the judgment of the medical examiner in charge, any indication of criminality, and such records shall not be open to public inspection."

Section 878-3.0 of the Administrative Code of the City of New York provides: "If the cause of such death shall be established beyond a reasonable doubt, the medical examiner in charge shall so report to his office. If, however, in the opinion of such medical examiner, an autopsy is necessary, the same shall be performed by a medical examiner. A detailed description of the findings *written during the progress of such autopsy* and the conclusions drawn therefrom shall thereupon be filed in his office."

Section 879-1.0 of the Administrative Code provides: "Records shall be kept in the office of the chief medical examiner, properly indexed, stating the name, if known, of every person dying under the circumstances described in section eight hundred seventy-eight of the charter, the

place where the body was found and the date of death. To the record of each case shall be attached the original report of the medical examiner and *the detailed findings of the autopsy,* if any. The appropriate district attorney and the police commissioner of the city may require from the chief medical examiner such further records, and such daily information, as they may deem necessary."

Civil Practice Act, section 367, now provides, and so provided prior to the adoption of our Constitution of 1938, as follows: *"Certificate of officer as evidence of facts.* Where a public officer is required or authorized, by special provision of law, to make a certificate or an affidavit touching an act performed by him, or to a fact ascertained by him, in the course of his official duty; and to file or deposit it in a public office of the state; the certificate or affidavit so filed or deposited, or an exemplified copy thereof, is presumptive evidence of the facts therein alleged, except where the effect thereof is declared or regulated by special provision of law."

The right of confrontation imports and confers the right of cross-examination. When that right was added to our State Constitution, there was eliminated the possibility of its deprivation by legislative act. When we interpret that addition to the Constitution, we must do so in the light of the law as it existed at the time of the change. Any exceptions to the right of confrontation or cross-examination existing prior to the adoption of the State constitutional provision and not contrary to its spirit, must be respected. (*Mattox* v. *United States,* 156 U. S. 237, 243.) In that case, speaking of the Constitution of the United States, the court used the following language (p. 243), which is particularly applicable here: "We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject—such as his ancestors had inherited and defended since the days

of Magna Charta. Many of its provisions in the nature of a Bill of Rights are subject to exceptions, recognized long before the adoption of the Constitution, and not interfering at all with its spirit. Such exceptions were obviously intended to be respected. A technical adherence to the letter of a constitutional provision may occasionally be carried farther than the safety of the public will warrant."

The right of an accused in a criminal action to be confronted by the witnesses who testify against him, is not violated by the introduction of so-called public documents or official records required to be kept. (*Heike* v. *United States,* 192 F. 83, 94, 95, affd. 227 U. S. 141; *Commonwealth* v. *Slavski,* 245 Mass. 405, 414, 415, 417; *People* v. *Reese* (1932), 258 N. Y. 89, 96; *People* v. *Corey,* 157 N. Y. 332; 5 Wigmore on Evidence, Sec 1398, pp. 136, 141, 142; Richardson on Evidence (6th ed.), Secs. 615, 616, 646, 647.)

The case of *Heike* v. *United States* (*supra*) is important since the right of confrontation is guaranteed by the Sixth Amendment to the Constitution of the United States. While that amendment is not a restraint upon the powers of the States (*People* v. *Bromwich,* 200 N. Y. 385-389), the United States Supreme Court decision is helpful in solving our problem here.

In *People* v. *Reese* (*supra,* CARDOZO, Ch. J.), we pointed out that our statutory rule of confrontation had never been deemed to require "the exclusion of certificates of records made by a public officer in the course of his official duty."

Referring to the requirement of confrontation, Professor Wigmore points out at section 1398, page 141 (*supra*):

"It follows equally that the constitutional provision does not exclude evidence admissible by way of exception to the Hearsay rule.

"The use of dying declarations has been often thus passed upon, and without any dissenting rulings.

"A like consequence must of course follow for the other exceptions to the Hearsay rule; it has been expressly sanctioned for official statements * * *."

In *People* v. *Corey* (157 N. Y. 332) an ante-mortem statement of the deceased was read in evidence on behalf of the People. Defense counsel objected to that evidence as "incompetent, improper and hearsay," and urged on appeal that "dying declarations, although competent at common law, are no longer competent, because the Code of Criminal Procedure, in prescribing the rights of the defendant in a criminal action, provides that he is entitled 'to be confronted with the witnesses against him in the presence of the court'" (p. 347). We said (WANN, J., at pp. 347-8): "We do not think the legislature intended to abolish the rule governing the admission of dying declarations, and such certainly has not been the understanding of the profession or the courts. We are not aware that this question has ever been raised before in this state, and yet the Criminal Code has been in force for nearly twenty years, and the Revised Statutes, which contain a similar provision, for nearly seventy years. (1 R. S. 94, Sec. 14.) The right of the accused to be confronted with the witnesses against him has always been a part of the Bill of Rights, and yet dying declarations have been received in evidence for time out of mind. The legislature doubtless intended to confer upon a defendant in a criminal action the right to be confronted with any living witness against him. It is upon this ground that the objection to the introduction of such declarations in evidence against a defendant, based on his constitutional right to be confronted with the witnesses against him, has been uniformly overruled in those jurisdictions where such constitutional provisions are in force. It is invariably held that the deceased is not a witness within the meaning of such a provision or of the Bill of Rights, and that it is

sufficient if the defendant is confronted with the witness who testifies to the declaration. (Citing cases.)"

While appellants concede that there is a recognized exception to the hearsay rule, in that certain public records may be received in evidence, they contend that no part of the autopsy report may be received because it is not a public record in view of the provision of New York City Charter, section 879, quoted (*supra*), that it "shall not be open to public inspection." In other words, it is argued that it is a condition precedent to admissibility that the record offered be available for inspection by the public, since that insures the accuracy and trustworthiness of the record. The only records not open to public inspection under the applicable statute here, are those delivered to the District Attorneys relating to deaths where there is indication of criminality. That is a proper exercise of the police power and in aid of law enforcement. The construction urged is too narrow. (See 5 Wigmore on Evidence, Secs. 1630, 1632, 1634.) Suffice it to say, as to the autopsy findings, that they were contained in a report filed in a public office by a public officer for a public purpose embodying facts required by statute to be stated therein. That was sufficient, although in the public interest they were available only to public officials.

The judgment should be affirmed. (See 294 N. Y.——.)

LEHMAN, Ch. J., LOUGHRAN, RIPPEY, LEWIS, DESMOND and THACHER, JJ., concur.

Judgment affirmed.

APPENDIX B

"I hereby certify that I, Dr. Louis L. Lefkowitz, have performed an autopsy on the body of Madylon Patricia McGeehan at Fordham Morgue on the 18th day of November 1942 at 2:30 P. M.

"Autopsy performed by Dr. Louis L. Lefkowitz, assistant medical examiner, in the presence of Detective I. J. Gannon, Shield No. 1227 of the Bronx Homicide Squad. Also Detective Thomas Farrell, No. 332 of the 41st Squad.

"A number of photographs of the body were taken by Detective Michael Wilson, Shield No. 583 of the Bronx Homicide Squad. Also photo of uterus and foetus.

"Autopsy: Body of that of a white adult female, about stated age; fairly well developed and nourished. Dark brown hair on head. Brown eybrows and eyelashes; teeth in good condition. There is bloody fluid oozing from the nose. Frothy oedema in the mouth.

"Breasts are enlarged, firm. The nipples and areoloe are brown. Glands of Montgomery present. On pressure, milky secretion exudes from both. Dark brown hair on pubes. Abdomen is distended. Rigidity is complete. Postmortem lividity present on the back. Finger nails well kept, and manicured. Finger tips covered with ink (finger-printing). There is a small ¾ inch surgical incision in the left ante-cubital fossa. In the right lower quadrant is a flat, old healed scar.

"Body opened by usual midline incision. Panniculus 1 inch. There is a haemorrhagic fluid filling the lower half of the peritoneal cavity. On the right side, there are some adhesions of the omentum to the scar in the right lower quadrant, above-described.

"Chest: Both pleura; cavities contain each, about three ounces of blood-tinged fluid.

"Right Lung: Surface is smooth, but dark purplish in color. The upper two lobes are fairly well aerated. The

lower lobes are deeply congested. All lobes are markely oedematous. There are no consolidations. No lumpiness. Bronchi and pulmonary vessels are natural.

"Left Lung: Surface is smooth; lower lobe dark purple in color. There are numerous petechial heamorrhages in the pleura in the lower lobe. There is one small haemorrhagic infarct measuring about 1 inch x 1 inch on the lower lobe.

"On section, both lobes are markedly oedematous. There is considerable frothy fluid in the bronchi. Pulmonary vessels are natural.

"Pericardium intact; contains normal amount of clear, serous fluid.

"Heart: Weighs 250 grams, normal in size and shape. Epicardial fat moderate. The musculature is firm, though somewhat pale, brown in color. There are no scars. No hypertrophies. The coronary vessels are natural. There is no chicken-fat on both sides. Valves are natural. Foramen ovale closed. There are numerous small yellowish atheromatous plaques in the first portion of the aorta.

"Abdomen: Mucosa of the Oesophagus is bile-stained.

"Stomach contains considerable coffe-ground material and bloody fluid. Mucosa shows numerous small haemorrhages.

"Pancreas is pale; otherwise natural, as to size, shape and configuration.

"Duodenum is natural.

"Small intestine is distended with liquid-brownish-green chyme. Mucoas natural.

"On the left side, there is considerable plastic exudate in the lumber region running upwards to the lower pale of the kidney, plastered on the posterior wall of the peritoneal cavity.

"Lying at the brim of the pelvis, free in the peritoneal cavity, between two coils of intestine is a portion of a foetus, which consists of the lower three cervical vertebrae, all the thoracix and lumbar vertebrae, the ribs of

the left side, and some loose tissue. The ribs on the other side, and the head are absent. This specimen measures about three inches in length and is mangled.

"Liver: Is normal in size; capsule smooth, pale. On section the cut surface is light brownish in color, but deeply congested. The architecture is otherwise normal.

"Gall bladder contains thick bile; mucosa is natural.

"Spleen: Is increased in size; weighs 180 grams; capsule is smooth, gray. On section, it is deeply congested. Moderately soft. Malpighian bodies are faint.

"Adrenals: Are natural.

"Kidneys: Normal in size; capsules strip readily, leaving smooth surfaces. On section the cortex is pale. Madulla is congested. Markings are distinct. Relationship of cortex to madulla is one to three. Pelves and urethers are natural.

"Pelvis organs dissected out en masse.

"Rectum: Is natural.

"Bladder contains a few cc. of cloudy urine.

"Vagina is natural.

"The cervix is soft, and the external os is patulous, admits a probe which is ½ inch in diameter, readily.

"Uterus measures from the fundus to the cervix 4 inches vertically, and 3¾ inches horizontaly, and 1½ inches anterior-posteriorly.

"The fallopian tubes are natural.

"Ovaries are normal in size. There is a corpus luteum about 3.4 inches in diameter in the left ovary. Right ovary is natural.

"At about the middle of the posterior surface of the uterus is a small fibroid, which measures about one inch by 1.2 inches x ¾ inch and is attached to the uterus by a rather broad peadacle. On the anterior surface of the uterus about ½ inch below the uppermost portion of the fundus is an irregular perforation, which readily admits the index finger; measures about ½ inch to ¾ inch in diameter. It is roughly round in shape; the edges are

necrotic, and ragged and from it there protrudes some blood-clot. The perforation above-described, penetrates the entire thickness of the anterior uterine wall, and there is some adherent placenta and membranes at the right fornix of the uterus. The remaining portion of the fundus of the uterus seems to be denuded of endometrium. There is some subendometrial haemorrhage in the internal os, which is also dilated and readily admits a finger-tip. The walls of the uterus are soft and oedematous."

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1944

No. .....

JOSEPH NISONOFF,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK.

PETITION FOR DIMINUTION OF THE RECORD BY DISPENSING WITH THE FILING OF TEN ADDITIONAL COPIES OF THE PRINTED RECORD

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, JOSEPH NISONOFF, respectfully prays, in connection with the foregoing petition for *writ of certiorari* that the rule of this Court requiring the filing, together with the petition for the *writ of certiorari*, of ten copies of the record in the court below, in addition to the certified copy of the same, be suspended, and the filing of such ten additional copies dispensed with. And in support of the said petition, your Petitioner respectfully shows to this Honorable Court the following facts:

1. The sole question presented on this application is the question of the admission in evidence of a certain document, to wit: the report of a medical examiner, who was not called as a witness at the trial, of an autopsy made by him. The said document is printed as an appendix to

the brief accompanying the foregoing petition for a *writ of certiorari.*

2. As can be seen from the opinion of the Court of Appeals of the State of New York, which is also printed as an appendix to the brief in support of the petition for a *writ of certiorari,* the constitutional question involved in the admission of the said document is not connected with or dependent upon any other matter which appears in the record, and there is no reference whatever in the opinion of the Court of Appeals to any other evidence or any other matter whatsoever appearing the said record. Your Petitioner therefore verily believes that the said record is not necessary for the determination of the question raised upon this application, nor would the additional copies be of use in the examination and consideration of said question.

3. There are only four copies of the said record available to your Petitioner, besides the certified copy which is intended to be filed with this petition, and your Petitioner is therefore not in a position to furnish more than the said four copies, which said four copies he is ready to file if the Court should feel that they might be of some use.

4. The printed record, as the Court may see from the certified copy of the same, contains over a thousand printed pages, and it would cost more than $1,000 to print the same. Your Petitioner is a poor man, actually confined in jail since April 20, 1945, and it would be a great hardship upon him if he were required to print additional copies of the record.

Wherefore, your Petitioner respectfully prays that an order be made by this Honorable Court, directing the diminution of the record by dispensing with the filing of ten additional copies as required by the rules of this Court.

Dated: New York, May 25, 1945.

Louis B. Boudin,
Attorney for Petitioner.

JUL 6 1945

IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No. 92

JOSEPH NISONOFF,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK.

BRIEF OF THE PEOPLE OF THE STATE OF NEW YORK IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

SAMUEL J. FOLEY,
District Attorney, Bronx County,
State of New York,

By GEORGE TILZER,
Assistant District Attorney,
851 Grand Concourse,
New York, 51, N. Y.

INDEX

PAGE

Facts 2

The Question Presented 6

Preliminary Statement 6

The Question 8

The Relevant Statutes 8

POINT I—The decision of the Court of Appeals of the State of New York herein is not erroneous or in conflict with any decision of this Court 10

The report of the autopsy findings of the Medical Examiner is a public record 17

The Medical Examiner is not a part of the machinery of the prosecutor's office 24

POINT II—No constitutional right of the petitioner has been violated 24

POINT III—The *Slavski* Case 27

CONCLUSION 29

APPENDIX A—Opinion of the Appellate Division of the Supreme Court of the State of New York, First Department 31

APPENDIX B—Opinion of the Court of Appeals of the State of New York 46

CASES CITED

	PAGE
Chesapeake & D. Canal Co. v. U. S., 240 Fed. 903	12
Coleman v. Commonwealth, 25 Grattan 865	19
Commonwealth v. Slavski, 245 Mass. 405	27, 28
English v. Bohan, Matter of, 175 Misc. 930	22
Frank v. Mangum, 237 U. S. 309	25
Heike v. United States, 192 Fed. 83, aff'd 227 U. S. 131	14
Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 81	26
Palko v. Connecticut, 302 U. S. 319	26
People v. English, 175 Misc. 751	22
People v. Nisonoff, 267 App. Div. 356	2, 7, 29
People v. Nisonoff, 293 N. Y. 597	17
People v. Reese, 258 N. Y. 89	13, 19
People v. Russell, 21 P. (2d) 959	26
Powell v. Alabama, 287 U. S. 45	25
Richards v. Robin, 178 App. Div. 535	15, 27
Senior v. Boyle, Matter of, 221 N. Y. 414	23
State v. McO'Blenis, 24 Mo. 402	15
Todd v. State, 69 So. 325	11
Ziegler, Matter of, 122 Misc. 351	22, 23

STATUTES CITED

PAGE

New York City Administrative Code:
Section 878-3.0 9
Section 879-1.0 9

New York City Charter:
Section 874 8
Section 875 8
Section 879 ..... 9, 22

New York Civil Practice Act:
Section 367 ..... 9, 15, 27

New York Public Officers Law:
Section 10 10

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Chamberlayne, Modern Law on Evidence, Vol. 5:
Section 3424 13
Section 3425 13

Jones, Commentaries on Evidence, Vol. 4 (2d Ed.), Section 1700 13

12 Corpus Juris, Section 979 26

Wigmore on Evidence, Vol. V (3d Ed.):
Section 1397 10
Section 1630 19
Section 1420 20
Section 1632 21
Section 1634 22

IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No. .....

JOSEPH NISONOFF,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK.

BRIEF OF THE PEOPLE OF THE STATE OF NEW YORK IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States.

This is an application by the Petitioner, Joseph Nisonoff, for a *writ of certiorari* to review the decision of the Court of Appeals of the State of New York, rendered on December 30, 1944, affirming an order of the Appellate Division of the Supreme Court of the State of New York, First Department, which order affirmed a judgment of the County Court of the County of Bronx, in the State of New York, convicting the Petitioner, Joseph Nisonoff, and another physician, Max J. Weinstein, of the crime of Manslaughter in the First Degree.

A motion for a reargument of the decision, on the merits, was denied by an order of the Court of Appeals of the State of New York, made March 1, 1945.

Facts

The Appellate Division of the Supreme Court of the State of New York, First Department, in affirming the judgment of conviction of Manslaughter in the First Degree herein, rendered an opinion (267 App. Div. 356, 358-362) which sets forth the facts in detail as follows:

> "Appellants, who were licensed physicians, have been convicted of manslaughter in the first degree. The crime charged was that they performed an illegal abortion upon one Madylon McGeehan resulting in peritonitis from which she died. A review of the record satisfies us that the guilt of the defendants was established by the overwhelming weight of the evidence. The principal assignment of error upon this appeal is that these defendants were prejudiced at the trial by the receipt of incompetent evidence.
>
> * * * * * *
>
> We find that the evidence in controversy was largely cumulative, that the essential matters sought to be established thereby were amply proved by other testimony, and that the evidence complained of related largely to the cause of death which was not substantially disputed. We would be content to rest with this statement of our conclusions, but we deem that the novelty of the question of law raised justifies a more extended discussion of the case.
>
> It was established upon the trial by direct proof that Madylon McGeehan died on November 18, 1942, at a hospital in Bronx County. It was conceded that the deceased had been admitted to this hospital at the instance of defendant Nisonoff, who had been consulted by her as a physician as early as November 10, 1942. It was further conceded that decedent had originally consulted defendant Weinstein as a physician and that he had referred her to Nisonoff.
>
> On admission of Miss McGeehan to the hospital as his patient, Dr. Nisonoff signed a diagnosis showing that she was suffering from 'incomplete abortion, probably peritonitis.' Dr. Nisonoff made a like statement in a letter he sent to the Board of Health of the City of New York on November 16, 1942.

On November 18, 1942, and shortly after the death of the deceased, Dr. Nisonoff signed a death certificate reading as follows:

> 'I hereby certify that I attended the deceased from November 15, 1942, to November 18, 1942, and last saw her alive at 6 A. M. on November 18, 1942.
>
> Statement of cause of death is based upon—principal cause of death: general peritonitis. Date of onset: November 16th; contributory cause of death: incomplete abortion * * *.'

These documents, concededly executed by defendant Nisonoff, established that deceased had experienced an abortion and that she had died from general peritonitis following the abortion.

The contention of the defendants upon the trial was, in substance, that the deceased was suffering from an incomplete and inevitable abortion on November 13, 1942, and that they had treated her only in an effort to save her life. That this defense was false was amply established by testimony other than the testimony of which appellants now complain. Consciousness of guilt was established by proof of the conceded falsity of the statements first made by the defendants when they were questioned by the authorities concerning the girl's death and by proof that in their reports of the illness, treatment and death of deceased, they had made further false statements and had concealed material and incriminating facts.

The alleged error complained of consisted of the admission in evidence of a written report of the findings of an assistant medical examiner, one Dr. Louis L. Lefkowitz, who had performed an autopsy on the body of the deceased. Dr. Lefkowitz died before the trial. His report (other than his opinion as to the cause of death), which had been filed in the office of the Chief Medical Examiner of the City of New York pursuant to statute, was received in evidence over defendants' objection and exception.

Upon the facts disclosed in this report, another physician, Dr. Thomas A. Gonzales, Chief Medical Examiner of the City of New York, called as a witness for the People, was permitted to express an opinion that deceased had died of general peritonitis as the result of an incomplete abortion.

We find that the opinion rendered on the basis of the facts in the challenged autopsy report did little more than substantiate other proof, including statements of the defendants themselves, as to the cause of death. Defendants contend, however, that the autopsy report was hearsay; that its receipt was violative of their constitutional rights to be confronted by and to cross-examine the witnesses against them, and that this was prejudicial error requiring reversal of the judgment of conviction.

In order to review in its proper light the question thus raised, we deem it necessary to further detail the evidence in the case.

One Henry Elters, a resident of Hazleton, Pennsylvania, and concededly an accomplice in the crime charged, testified that he had arranged with defendant Weinstein, on or about October 15, 1942, to examine physically Madylon McGeehan. Miss McGeehan was then a resident of Washington, D. C., and came to New York a week later for the examination. Dr. Weinstein pronounced her pregnant. An abortion was then discussed over the telephone by Elters and Weinstein. The latter recommended a physician who was visited by the parties but who refused to participate in the case. Defendant Weinstein then arranged for a visit to defendant Nisonoff. After one futile attempt to contact the latter at his New York County office, Nisonoff was finally visited by deceased and Elters on November 10th at an office he maintained in Queens County. After examination, Dr. Nisonoff stated that Madylon McGeehan was pregnant. He testified that on this visit he found her condition such that he advised her that she could complete a normal pregnancy.

Witnesses for the People stated that deceased expressed reluctance to have an abortion performed on this occasion. However, several days later, and on November 13, 1942, she returned to the Queens office of Dr. Nisonoff with Elters and Weinstein, after Weinstein had arranged for the visit.

Dr. Nisonoff testified that on an examination made on this day he found a marked change in her condition since the visit of the 10th and that a condition of inevitable abortion had developed.

There was contrary testimony given on the trial by one Camille Ewald, Dr. Nisonoff's nurse, also an accomplice, who testified for the People. She related circumstances in connection with the preparation of the deceased for the operation performed on the 13th which tended to show that deceased was in a normal state of pregnancy on that date.

Testimony was also given by a physician practicing in Washington, D. C., to the effect that he had examined deceased on October 23, 1942, and had found her pregnant and her condition good. As against this, there was some evidence that deceased had related to Elters, between October 15th and October 23rd, that she had suffered some bleeding; and there was further evidence that she had been nauseated on the way over to Dr. Nisonoff's office on November 13th.

* * * * * *

Concededly, on November 13, 1942, a fee of $600 was arranged and paid over to defendants, and an operation was commenced by Dr. Nisonoff on that date. The details of what occurred were testified to by Miss Ewald, as well as by the defendants. She stated that in the course of the operation there was a sudden spurting of blood which struck the doctor's glasses; that he expressed concern over what had happened and thereupon stopped the operation. The doctor requested Miss Ewald to take the patient to her (Miss Ewald's) apartment nearby. The patient remained there until November 15th, when Dr. Nisonoff caused her to be removed to the hospital in the Bronx where she later died. During the time that the patient was at the nurse's home, Dr. Nisonoff visited her several times. On one occasion he prepared a prescription for certain medicine for her, but instead of inserting the patient's name, he inserted the name of the nurse, Ewald, and used the nurse's age, thus evidencing an intention to conceal the treatment undertaken.

We have already noted that Dr. Nisonoff prepared a diagnosis report on November 15th and issued a letter to the Board of Health on November 16th. In neither of these documents did he state anything concerning earlier treatment by him. In the letter of the 16th, he stated that his patient had denied any criminal

interference with her pregnancy, although his testimony indicated that he had found interference.

It will also be noted that in the death certificate Dr. Nisonoff stated that he had only been in attendance on the patient from November 15, 1942, thus concealing what had occurred as to the examination and operation by him prior to the 15th. In addition, there was considerable testimony showing that both Weinstein and Nisonoff had requested Elters and Ewald, if questioned by the authorities, to omit any mention of defendants' connection with the case prior to November 15th.

The defendants, when questioned by the authorities, had both stated that their connection with the case had commenced on the 15th and had further stated that the patient had been taken from Dr. Weinstein's office in the Bronx to the hospital in a taxicab, whereas in fact she had come from Miss Ewald's home in Queens in an ambulance.

Defendants admitted on the trial that these statements to the authorities were false. Their only excuse for making false statements was, in effect, that they had done so at the suggestion of the nurse, Ewald, and to save her from embarrassment in some investigation to which she was being subjected" (fols. 2977-2996).

The Question Presented

Preliminary Statement

Shortly before the trial herein, the Assistant Medical Examiner, Dr. Louis L. Lefkowitz, who had performed the autopsy upon the deceased, Madylon McGeehan, died.

By reason of his death, the prosecution was unable to establish the cause of death by the testimony of the Assistant Medical Examiner who, ordinarily, would be called to testify to his autopsy findings, and to express an opinion as to the cause of death.

Instead, the prosecution, after preliminary proof as to its authenticity, offered, in evidence, the original autopsy findings, signed by the Assistant Medical Examiner, Dr.

Lefkowitz, and filed by him, in the office of the Chief Medical Examiner, *eliminating therefrom his opinion as to the cause of death.*

The Chief Medical Examiner was then called as a witness, and expressed an opinion as to the cause of death, based upon these autopsy findings.

As indicated in the opinion of the Appellate Division of the Supreme Court of the State of New York, First Department, a copy of which is set forth herein, as Appendix A,

> "• • • • *All parties agreed that peritonitis had been the cause of death.*
>
> • • • • • • •
>
> *Nor was the autopsy report offered as the sole proof of the facts of death or of the cause thereof.* • • •." (Italics ours.)
>
> *People* v. *Nisonoff*, 267 App. Div. 356, 365.

It was generally agreed, upon the trial, that the deceased died of peritonitis caused by an incomplete abortion (fols. 257-258, 281-282, 295-296, 1958-1960, 1965-1966; People's Exhibit 8, fols. 1167-1168, 1172-1173; People's Exhibit 6, fols. 1273-1275; People's Exhibit 7, fols. 1447-1448, 2344-2355).

Dr. Nisonoff, the petitioner herein, when testifying in his own behalf, repeatedly stated that the deceased had been tampered with before she came to see him; that her pregnancy had been interfered with, and that she was suffering from an incomplete abortion which resulted in a general peritonitis causing her death (fols. 1529-1531, 1550, 1565-1566, 1578-1579, 1585, 1589, 1590, 1596-1598, 1644, 1662, 1671, 1674, 1686, 1718, 1741, 1742, 1746-1747, 1751, 1868, 1878-1879, 1909-1910, 1915, 1917, 1925).

Two experts, called as witnesses by petitioner, testified, in response to hypothetical questions, that the deceased was suffering from an inevitable or incomplete abortion (fols. 2254-2255, 2288-2298).

The sole important issue litigated upon the trial was whether or not the petitioner and his co-defendant had performed the illegal abortion which resulted in the death of the deceased.

The Question

Did the admission into evidence of the report of the deceased Medical Examiner of the City of New York of his findings during the autopsy performed upon the body of Madylon McGeehan, as a basis for an expert opinion as to the cause of death of the said Madylon McGeehan, violate the Petitioner's right of confrontation and the "Due Process Clause" of the Fourteenth Amendment to the Constitution of the United States?

The Relevant Statutes

The Office of Medical Examiner of the City of New York is provided for by Section 874 of the New York City Charter. This section reads, in part, as follows:

> "There shall be the office of chief medical examiner the head of which shall be the chief medical examiner *who shall be appointed* by the mayor *from the classified civil service and be a doctor of medicine and a skilled pathologist and microscopist* • • •." (Italics ours.)

Provision for the appointment of Assistant Medical Examiners is found in Section 875 of the New York City Charter, which reads as follows:

> "The chief medical examiner may appoint and remove such deputies, assistant medical examiners, scientific experts and other officers and employees as may be provided for in the budget. The deputy medical examiners and assistant medical examiners shall possess the same qualifications as the chief medical examiner."

Section 879 of the New York City Charter provides:

> "It shall be the duty of the Chief Medical Examiner to keep full and complete records in such form as may be provided by law. The Chief Medical Examiner shall promptly deliver to the appropriate District Attorney copies of all records relating to every death as to where there is, in the judgment of the Medical Examiner in Charge, any indication of criminality, and such records shall not be open to public inspection."

Section 878-3.0 of the Administrative Code of the City of New York provides:

> "Q. If the cause of such death shall be established beyond a reasonable doubt, the medical examiner in charge shall so report to his office. If, however, in the opinion of such medical examiner, an autopsy is necessary, the same shall be performed by a medical examiner. A detailed description of the findings *written during the progress of such autopsy* and the conclusions drawn therefrom shall thereupon be filed in his office." (Italics ours.)

Section 879-1.0 of the Administrative Code provides:

> "Records shall be kept in the office of the chief medical examiner, properly indexed, stating the name, if known, of every person dying under the circumstances described in section eight hundred seventy-eight of the charter, the place where the body was found and the date of death. To the record of each case shall be attached the original report of the medical examiner and *the detailed findings of the autopsy,* if any. The appropriate district attorney and the police commissioner of the city may require from the chief medical examiner such further records, and such daily information as they may deem necessary." (Italics ours.)

The Civil Practice Act of the State of New York, section 367, provides:

> "Certificate of officer as evidence of facts. Where a public officer is required or authorized, by special provision of law, to make a certificate or an affidavit

> touching an act performed by him, or to a fact ascertained by him, in the course of his official duty; and to file or deposit it in a public office of the State; the certificate or affidavit so filed or deposited, or an exemplified copy thereof, is presumptive evidence of the facts therein alleged, except where the effect thereof is declared or regulated by special provision of law."

Section 10 of the Public Officers Law of the State of New York provides that a public officer shall take an oath before entering upon the duties of his office.

POINT I

The decision of the Court of Appeals of the State of New York herein is not erroneous or in conflict with any decision of this Court.

The petitioner contends that, by the introduction in evidence of the report of the autopsy findings of the deceased medical examiner, he was denied his constitutional right to be confronted by the witness, and further contends that he was, thereby, denied the right of cross-examination.

The right of confrontation imports and confers the right of cross-examination.

> "There never was at common law any recognized right to an indispensable thing called Confrontation as distinguished *from Cross-examination.* There *was* a right to cross-examination as indispensable, and that right was involved in and secured by confrontation; it was the same right under different names. * * *"
>
> *Wigmore on Evidence,* Vol. V (3d Ed.), Sec. 1397, pp. 128-129.

Wigmore in his treatise on Evidence (Vol. 5, 3d Ed., Sec. 1397), pages 130, 131, discussing exceptions to the rule of confrontation and the hearsay rule says:

"Moreover, this right of cross-examination thus secured was *not a right devoid of exceptions.* The right to subject opposing testimony to cross-examination is the right to have the Hearsay rule enforced; for the Hearsay rule is the rule requiring cross-examination (ante, Sec. 1362). Now the Hearsay rule is not a rule without exceptions; there never was a time when it was without exceptions. There were a number of well-established ones at the time of the earliest constitutions, and others might be expected to be developed in the future. The rule had always involved the idea of exceptions, and the constitution-makers indorsed the general principle merely as such. They did not attempt to enumerate exceptions; they merely named and described the principle sufficiently to indicate what was intended, * * *."

In *Todd* v. *State* (69 So. 325), at page 327, the Court of Appeals of Alabama said:

"* * * It is thoroughly settled and familiar that there are well-known and generally recognized exceptions to the rule grounded on constitutional guaranty that the accused has the right to be confronted with the witnesses against him. These exceptions find support in and are based upon principles of public policy, expediency or necessity. * * *"

And at page 328, that Court further said as follows:

"The constitutional rule of confrontation is but a sanction or guaranty of the right recognized under the common law, and is subject to the same exceptions as then existed, and those that may be legitimately found to exist, developed or created in the future in consonance with the progress of human affairs through necessity, expediency, or public policy. Other exceptions that may be made are but the necessary application of old rules to the new order of things and new conditions. The federal Constitution, and the constitutions of most, if not all, of the states, contain similar provision to our Constitution in this particular, and it has been almost universally recognized in all jurisdictions, both federal and state, that the rule is not

impaired by, nor does it apply or extend to, documentary proofs or record evidence. 2 Bishop's New Criminal Procedure, Section 1134, and footnote citing numerous authorities; 12 Cyc. 543 (b); 8 Ency. Ev. 471 (b); 10 Ency. Ev. 880 (1); 14 Ency. Ev. 581 (5)."

In *Chesapeake & D. Canal Co.* v. *U. S.* (240 Fed. 903), at page 907, the Court said:

"* * * We understand the general rule to be that when a public officer is required, either by statute or by the nature of his duty to keep records of transactions occurring in the course of his public service, the records thus made, either by the officer himself or under his supervision, are ordinarily admissible, although the entries have not been testified to by the person who actually made them, and although he has therefore not been offered for cross-examination. *As such records are usually made by persons having no motive to suppress or distort the truth or to manufacture evidence, and, moreover, are made in the discharge of a public duty, and almost always under the sanction of an official oath,* they form a well-established exception to the rule excluding hearsay, and, while not conclusive, are 'prima facie' evidence of relevant facts. The exception rests in part on the presumption that a public officer charged with a particular duty has performed it properly. *As the records concern public affairs, and do not affect the private interest of the officer, they are not tainted by the suspicion of private advantage.* * * *" (Italics ours.)

One of the well recognized exceptions to the hearsay rule, at common law, is the admissibility of records made by public officers, in the course of their official duty, or pursuant to statutory mandate.

The rule, in respect to records made by public officers in the course of the performance of their official duties, or pursuant to statutory requirement, is stated in 23 C. J. S., Section 844, page 30, as follows:

"All public records which are by law required to be kept for the purpose of preserving evidence of

transactions and occurrences for public uses are competent to establish such transactions or occurrences when they are material in a criminal prosecution. * * *"

Chamberlayne in his Modern Law on Evidence (Vol. 5, Sec. 3424, pp. 4714 and 4715) lays down the rule as follows:

"Records made by pubic officers in the course of their official duty under a law which requires the keeping of such records or which are required by the nature of the office are ordinarily admissible as prima facie though not conclusive evidence of the facts which they assert. It is not essential to their admissibility that a statute require that they be kept, it being sufficient if necessary to keep them in the discharge of a public duty. * * *"

And in Section 3425, at page 4716, the following is stated:

"A record to be admissible as a public record should be intended as a mode of preserving the recollection of the facts. * * *"

In Jones, Commentaries on Evidence (Vol. 4 [2nd ed.], Sec. 1700, pp. 3117, 3118) the rule is thus stated:

"When persons in public office are required by statute or by the nature of their office to write down particular transactions occurring in the course of their public duties and under their personal observation, such records are usually admissible as substantive evidence. *When such entries are made by authorized public agents in the course of public duty, and relate to matters in which the whole public may be interested, the circumstances are deemed sufficient sanctions to dispense with the necessity of an oath and cross-examination.* * * *" (Italics ours.)

Judge Cardozo, in *People* v. *Reese* (258 N. Y. 89, at p. 96), said:

"* * * The rule of confrontation * * * has never been deemed to require the exclusion of certificates or records made by a public officer in the course of his official duty. * * *"

In *Heike* v. *United States* (192 Fed. 83, aff'd 227 U. S. 131) the Court discusses the admissibility of records made by public officers, in the course of their official duties or pursuant to statute. At page 94, the Court said as follows:

"It is contended that there was error in admitting certain dock books of the assistant United States weighers. In these were recorded by such assistant weighers the results of their observations of the scales, made at the time of weighing. These were official records of the government and produced from its files. Such records are not covered by the hearsay rule. It is elementary that they are *prima facie* evidence of what they purport to record.

In support of the defendants' contention reference is made to Section 1 of article 6 of the amendments of the Constitution of the United States, which provides that:

'In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him.'

The scope of that provision was fully discussed by the Supreme Court in Mattox v. U. S., 156 U. S. 237, * * * where exception was reserved to the introduction of the stenographic report of the testimony of a deceased person given on a former trial. In overruling this exception the court said:

'We are bound to interpret the constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guarantees of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject * * * such as his ancestors had inherited and defended since the days of Magna Charta. Many of its provisions, in the nature of a bill of rights, are subject to exceptions, recognized long before the adoption of the Constitution, and not interfering at all with its spirit. Such exceptions were obviously intended to be re-

spected. A technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused and farther than the safety of the public will warrant. For instance, there could be nothing more directly contrary to the letter of the provision in question than the admission of dying declarations. They are rarely made in the presence of the accused. They are made without any opportunity for examination or cross-examination. Nor is the witness brought face to face with the jury. Yet from time immemorial they have been treated as competent, and no one would have the hardihood at this day to question their admissibility.' "

In *State* v. *McO'Blenis* (24 Mo. 402, at p. 416) the Court, speaking of the right of confrontation, said:

" • • • The purpose of the people was not, we think, to introduce any new principle into the law of criminal procedure, but to secure those that already existed as part of the law of the land from future change by elevating them into constitutional law. It may as well be the boast of an Englishman living under the common law, as of a citizen of this state living under our Constitution, that in a criminal prosecution he has a right to meet the witnesses against him face to face; and yet it was never supposed in England, at any time, that this privilege was violated by the admission of a dying declaration, or of the deposition of a deceased witness, under proper circumstances; nor, indeed, by the reception of any other hearsay evidence established and recognized by law as an exception to the general rule. • • • "

This exception, in favor of records of public officers was recognized at common law, and in the State of New York has been incorporated into the Civil Practice Act of the State of New York by Section 367 (formerly Section 922 of the Code of Civil Procedure of the State of New York).

Thus, in *Richards* v. *Robin* (178 App. Div. 535) which involved the liquidation of the affairs of a bank by the

Superintendent of Banks, it was held that an inventory of assets and list of claims filed in the office of the Clerk of the County of New York, by the State Superintendent of Banks, pursuant to the requirements of the Banking Law, was by virtue of Section 922 of the Code of Civil Procedure (present Section 367 of the Civil Practice Act) properly admitted in evidence, and was sufficient to establish a prima facie case of insolvency. At page 539, the Court said:

> "* * * It may be noted that this section (sec. 922 Code Civ. Pro., present sec. 367 Civ. Prac. Act) incorporates into the Code a portion of the broader common law rule that an official statement kept or prepared by or under the direction of a public officer, acting under his oath of office, either pursuant to a positive requirement of statute or in the discharge of a public duty, is competent prima facie evidence as against all the world of such facts therein stated as the official was required or authorized by law to state (3 Wigm. Ev. Sec. 1630 et seq.; Saranac Land & Timber Co. v. Roberts, 208 N. Y. 288, 299; Board of Water Comrs. of Cohoes v. Lansing, 45 id. 19; People ex rel. Stone v. Minck, 21 id. 539; Evanston v. Gunn, 99 U. S. 660; Gaines v. Relf, 12 How. (U. S.) 472, 570). * * *" (Words in parentheses ours.)

In its opinion herein, the Court of Appeals of the State of New York also recognized the existence at common law of such an exception in favor of records made by public officers.

Speaking of the right of confrontation, the Court of Appeals of the State of New York, in the instant case said:

> "The right of confrontation imports and confers the right of cross-examination. When that right was added to our State Constitution, there was eliminated the possibility of its deprivation by legislative act. When we interpret that addition to the Constitution, we must do so in the light of the law as it existed at the time of the change. Any exceptions to the right

of confrontation or cross-examination existing prior to the adoption of the State constitutional provision and not contrary to its spirit, must be respected. (Mattox v. United States, 156 U. S. 237, 243.) In that case, speaking of the Constitution of the United States, the court used the following language (p. 243), which is particularly applicable here: 'We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizens, but as securing to every individual such as he already possessed as a British subject—such as his ancestors had inherited and defended since the days of Magna Charta. Many of its provisions in the nature of a Bill of Rights are subject to exceptions, recognized long before the adoption of the Constitution, and not interfering at all with its spirit. Such exceptions were obviously intended to be respected. A technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused, and farther than the safety of the public will warrant.'

The right of an accused in a criminal action to be confronted by the witnesses who testify against him, is not violated by the introduction of so-called public documents or official records required to be kept. (Heike v. United States, 192 F. 83, 94, 95, aff'd 227 U. S. 131; Commonwealth v. Slavski, 245 Mass. 405, 414, 415, 417; People v. Reese (1932), 258 N. Y. 89, 96; People v. Corey, 157 N. Y. 332; 5 Wigmore on Evidence, Section 1398, pp. 136, 141, 142; Richardson on Evidence (6th ed.), Sections 615, 616, 646, 647.)"

People v. *Nisonoff*, 293 N. Y. 597, 601-602.

The report of the autopsy findings of the Medical Examiner is a public record

The petitioner argues that the autopsy report is not a public record because it is not open to public inspection.

He stresses the fact that by reason of the provisions of Section 879 of the New York City charter, the autopsy findings were not open to public inspection and, therefore, were inadmissible in evidence as a public record.

The petitioner intimates that the right of public inspection assures the accuracy and trustworthiness of a record.

It is respectfully submitted however, that not one iota would have been added to the accuracy and trustworthiness of the autopsy findings, even if the autopsy report were open to public inspection.

It will be recalled that an assistant medical examiner is required, by statute, to be a skilled pathologist, microscopist, and a doctor of medicine.

What Dr. Lefkowitz, the medical examiner, recorded were the physical facts which he observed, and which would not have been differently recorded, if observed by any other skilled pathologist, microscopist and doctor of medicine.

The accuracy and trustworthiness of the autopsy findings stem from the fact that it was made by a public officer, whose qualifications were prescribed by statute. It was made and filed pursuant to statutory mandate, by one who had taken an oath of office, and personally observed the facts which he recorded. He was indifferent to the matter. He had no personal interest and no motive whatsoever to record anything but what he personally observed.

It is respectfully submitted that the term "public record" should not be given the narrow construction sought to be given it by the petitioner.

The word "public" connotes more than the mere right of inspection by the public.

The autopsy report in question was made by a public officer, for public purposes and not for private purposes. It is a record belonging to the public, and not to the individual who made it. It is this that gives it a public character and makes it a public record.

A public record is not necessarily one open to public inspection, but rather one made for public purposes, by a public officer, pursuant to statute, or by reason of the duties of his office.

It is significant that Judge Cardozo, in *People* v. *Reese*, supra, speaking of the rule of confrontation and its exceptions, does not speak of a public record but rather of a record made by a public officer.

In *Coleman* v. *Commonwealth* (25 Grattan 865, at pp. 881-882) the Court said:

> "• • • Whenever a written record of the transactions of a public officer in his office, is a convenient and appropriate mode of discharging the duties of his office, it is not only his right but his duty to keep that memorial, whether expressly required so to do or not; and when kept it becomes a public document—a public record belonging to the office and not the officer; is the property of the State and not of the citizen, and is in no sense a private memorandum."

Wigmore, discussing the exception to the hearsay rule in favor of records of public officers says:

> "The scope of this exception is often designated by the term 'public documents'.
>
> But this term is inadequate and misleading: In the first place the word '*public*' is ambiguous. It may signify 'open to all,' 'capable of being known or observed by all'; or it may signify 'having an interest for persons in general'; or it may signify 'made or done by an officer of the government'. • • •
>
> So far as the term may indicate a general principle, it is obvious that the principle may result in different rules according to the sense in which the word 'public' is to be interpreted. This ambiguity of phrase has already caused an undesirable uncertainty in the scope of the exception; and it is better to avoid a confusing terminology. The word 'official' more accurately signifies the essence of the principle dominating the exception."
>
> • • • • • •
>
> "For these reasons, the term 'Official Statements' seems preferable as a designation of the present exception to the hearsay rule."
>
> Wigmore on Evidence, Vol. V (3d Ed.), Sec. 1630, pp. 512-513.

The petitioner urges that he was denied the right of cross-examination.

Wigmore, in discussing the value of cross-examination, as a means of testing credibility, points out that in the case of records made by public officers, since the presumption is that a public officer does his duty, and since the probability is that he makes a correct statement, this presumption and probability take the place of cross-examination. Thus, he says:

> "* * * The theory of the hearsay rule * * * is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation. * * *". Wigmore on Evidence, Vol. V (3d Ed.), Sec. 1420, p. 202.

Wigmore, speaking of the principle of circumstantial probability of trustworthiness, says:

> "Two reasons are judicially sanctioned as justifying the present exception in this respect. The second is of modern English suggestion, and has not received recognition in the United States. * * *"
>
> "(1) The first reason is related in its thought to the presumption that public officers do their duty. When it is a part of the *duty of a public officer* to make a statement as to a fact coming within his official cognizance, the great probability is that he does his duty and makes a correct statement. * * *
>
> The fundamental circumstance is that an official duty exists to make an accurate statement, and this special and weighty duty will usually suffice as a motive to incite the officer to its fulfillment. * * * It is the influence of the official duty, broadly considered, which is taken as the sufficient element of trustworthiness, justifying the acceptance of the hearsay statement."
>
> * * * * * * *

"(2) It has also been suggested by some English judges that a second circumstance forms an essential part of the sanction for receiving such hearsay statements, namely, the circumstance of *publicity*. * * * Where an official record is one necessarily subject to public inspection, the facility and certainty with which errors would be exposed and corrected furnishes a special and additional guarantee of accuracy. * * *"

Wigmore on Evidence, Vol. V (3d Ed.), Sec. 1632, pp. 514-516.

This requirement of publicity was expounded as an essential one by Lord Blackburn, in the case of *Sturla* v. *Freccia* (L. R. 5 App. Cas. 623), cited by the petitioner.

Wigmore, in commenting upon the reason advanced by Lord Blackburn for the requirement of publicity, says:

"This reasoning is plausible, and does, no doubt, add to many official documents a special measure of trustworthiness. But it should not be regarded as justifying a definite limitation of the scope of the exception; for its strict application would exclude many classes of official documents which are in fact admitted and ought in reason to be admitted. * * * It can hardly be supposed that this bare possibility of inspection can have any appreciable subjective influence upon the officer. * * *

It would seem that this second reason, put forward so definitely by Lord Blackburn, is to be regarded as merely a casual advantage, and not an essential limitation, * * *."

Wigmore on Evidence, Vol. V (3d Ed.), Sec. 1632, pp. 516-517.

Wigmore points out that the requirement of publicity seems to be the present law of England, but is not the law of the United States.

Thus, Wigmore says:

"In the United States no definite acceptance of this limitation seems to have been made; although in a few

opinions the element of publicity has been referred to 'obiter' as essential."

"For the reasons already indicated • • • the limitation is not a desirable one. • • • "

Wigmore on Evidence, Vol. V (3d Ed.), Sec. 1634 p. 525.

The case of *Sturla* v. *Freccia*, supra, is not analogous to the instant case.

In *Sturla* v. *Freccia*, the document which was held to be inadmissible was a report of certain persons, who had conducted a certain investigation which involved the making of inquiries and the searching of records.

Clearly, the situation in that case is wholly unlike the situation in the case at bar. In the instant case, the report of the autopsy findings was not the result of an investigation which involved the questioning of persons and the searching of records, but was the report of physical facts personally observed by one qualified to make the observations.

It is respectfully submitted, therefore, that under the common law and by virtue of the provisions of section 367 of the Civil Practice Act of the State of New York, the report of the autopsy findings of the Medical Examiner is a public record, which is admissible in evidence, notwithstanding the right of confrontation.

In support of his contention that the report of the autopsy findings is not a public record, the petitioner relies upon the cases of *People* v. *English* (175 Misc. 751), *Matter of English* v. *Bohan* (175 Misc. 930), and *Matter of Ziegler* (122 Misc. 351). These cases are not authority for the contention of the petitioner.

The cases of *People* v. *English*, and *Matter of English* v. *Bohan*, supra, involve applications for leave to inspect autopsy reports. The applications were denied by reason of Section 879 of the New York City Charter, which provides that autopsy reports shall not be opened to public inspection where there is any indication of criminality.

The case of *Matter of Ziegler,* supra, involved an application to inspect reports of the police department, and it was held that such reports were of a confidential nature and not open to public inspection.

Insofar as these three cases speak of the autopsy report of a medical examiner as not being a public record, they must be deemed to have been overruled by the decision of the Court of Appeals in the case at bar.

The petitioner seeks to draw an analogy between the reports of coroners' inquests and the report of the autopsy findings of the Medical Examiner herein. He urges that the reports of coroners' inquests have been held to be hearsay and inadmissible as evidence.

The fundamental basis for the exclusion of a coroner's inquest is that such inquest involves an inquiry and investigation, upon which witnesses are sworn, examined and cross-examined, and involves an appraisal of the credibility of such witnesses. It is not the result, solely, of personal observation of physical facts, as in the case of the report of the autopsy findings of a medical examiner.

As was said in *Matter of Senior* v. *Boyle* (221 N. Y. 414, 417):

> "• • • But the characteristic features of the office and power of a coroner (Code of Crim. Pro. Secs. 773-790) are not retained. The chief medical examiner acts without a jury, holds no inquest, renders no decision, holds no one to answer, issues no warrant of arrest. The ancient office is gone and the ancient duties have largely disappeared with it. Another method of investigating suspicious deaths has supplanted crowner's quest • • •."

So that, there is no analogy between a coroner's inquest and the report of the autopsy findings of a medical examiner.

The Medical Examiner is not a part of the machinery of the prosecutor's office

The petitioner seeks to create the impression that the Medical Examiner's office is a part of the machinery of the prosecutor's office. He intimates that prosecutors frequently act in a partisan manner and, therefore, the autopsy report of a medical examiner is untrustworthy. There is no basis for this contention.

The Medical Examiner's office is entirely distinct and separate from the prosecutor's office. The employees of the Medical Examiner's office, including the Assistant Medical Examiners, are under the exclusive control and direction of the Chief Medical Examiner, by whom they are appointed from Civil Service lists. They are, in no way, subject to the orders of the prosecutor, and he has no supervision over them, directly or indirectly.

It is significant that at no time, either upon the trial, or upon the appeals to the Appellate Division of the Supreme Court of the State of New York, First Department, and to the Court of Appeals of the State of New York, was it suggested that the Medical Examiner's office was a part of the machinery of the prosecutor's office or that the Medical Examiner who performed the autopsy upon the body of the deceased, Madylon McGeehan, had any interest whatsoever in the prosecution of the petitioner.

POINT II

No constitutional right of the petitioner has been violated.

The petitioner asserts that, by the introduction in evidence of the autopsy report of the findings of the Medical Examiner, there has been a violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

He urges that the right of confrontation, which is guaranteed to the citizens of the United States, in the Federal Courts, under the Sixth Amendment to the Constitution of the United States, is guaranteed to the citizens of the States, by virtue of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

In support of his contention, he cites numerous cases, none of which passes upon the question involved herein.

The cases cited by the petitioner are those in which the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States was held to have been violated, because confessions, obtained by the use of force, violence and coercion, were received in evidence against the accused, and because the accused were denied the right of counsel.

What constitutes "due process of law" has been enunciated in the case of *Frank* v. *Mangum* (237 U. S. 309, at p. 326) as follows:

> "As to the 'due process of law' that is required by the Fourteenth Amendment, it is perfectly well settled that a criminal prosecution in the Courts of a State, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the State, so long as it includes notice, and a hearing, or an opportunity to be heard, before a Court of competent jurisdiction, according to established modes of procedure, is 'due process' in the Constitutional sense. * * * "

And in the case of *Powell* v. *Alabama* (287 U. S. 45, at p. 65) this Court said:

> "One test which has been applied to determine whether due process of law has been accorded in given instances is to ascertain what were the settled usages and modes of proceeding under the common law and statute law of England before the Declaration of Independence, subject, however, to the qualification that they be shown not to have been unsuited to the civil

and political conditions of our ancestors by having been followed in this country after it became a nation. * * *"

In the case at bar, the petitioner had a fair and impartial trial, before an unbiased judge, and a jury of his own selection, according to established modes of procedure. He had ample time to prepare his defense, and to present it in its most favorable aspect to a jury. He was, at all times, represented by able and experienced counsel.

The argument of the petitioner that the admission in evidence of the report of the autopsy findings of the Medical Examiner deprived him of a fundamental right, because it deprived him of the right of confrontation, and the right of cross-examination is without merit.

The right of the petitioner to be confronted by the Medical Examiner is "not of the very essence of a scheme of ordered liberty". The denial of that right does not violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamenetal".

Palko v. *Connecticut*, 302 U. S. 319, 325.

Accordingly, it has been held that a statute making certain records evidence of a prior conviction, did not violate the due process clauses of State and Federal Constitutions.

People v. *Russell* (21 P. [2d] 959).

This Court, in the case of *Lindsley* v. *Natural Carbonic Gas Co.* (220 U. S. 61, 81), has held that:

"Each State possesses the general power to prescribe the evidence which shall be received and the effect which shall be given to it in her own courts * * *."

In 12 C. J., Section 979, at pages 1205-1206, the rule is stated as follows:

"Generally speaking, the legislature may, without denial of due process of law, establish and alter the

rules relating to the admission and effect of evidence in criminal cases; and the same is true as to the powers of Congress in prescribing rules of evidence for trials in the Federal Courts. If the rule of evidence prescribed by statute is reasonable in itself, and does not deprive the accused person of reasonable opportunity to make his defense or to give in evidence all the facts relating to the issue, it is due process of law within the constitutional guarantees."

We have heretofore shown that the report of the autopsy findings of the Medical Examiner is a report filed in a public office, by a public officer, for a public purpose, embodying facts required by statute to be stated therein.

Such a record of a public officer was admissible at common law, prior to the adoption of the Constitution of the United States, and is also made admissible in evidence by *Section 367 of the Civil Practice Act of the State of New York, which incorporates into the statute "a portion of the broader common law rule that an official statement kept or prepared by or under the direction of a public officer, acting under his oath of office, either pursuant to a positive requirement of statute or in the discharge of a public duty, is competent prima facie evidence as against all the world of such facts therein stated as the official was required or authorized by law to state."*

Richardson v. *Robin*, 178 App. Div. 535, 539.

POINT III

The *Slavski* Case.

The petitioner, recognizing the applicability, to the case at bar, of the case of *Commonwealth* v. *Slavski* (245 Mass. 405), cited by the Court of Appeals of the State of New York, in its opinion herein, attempts to differentiate that case from the case at bar.

The *Slavski* case involved an alleged illegal sale of liquor.

A statute of the State of Massachusetts permitted the receipt in evidence of an analysis by a State chemist showing the alcoholic content of a certain beverage.

It was also provided by Article 12 of the Declaration of Rights of the State of Massachusetts that in a prosecution for crime "every subject shall have a right * * * to meet the witnesses against him face to face".

The accused in the *Slavski* case contended that he was denied the right to be confronted by the witnesses against him, because of the introduction in evidence of the report of a State chemist setting forth an analysis of the alcoholic content of the beverage in question.

The Court, in that case, overruled that contention, and in its opinion pointed out that such a record was admissible at common law.

Thus, the Court in *People* v. *Slavski,* supra, at page 415, said:

> "One of the acknowledged exceptions to the face to face rule of evidence is that public records are competent evidence when of probative value respecting an issuable fact. That is an ancient principle of the common law, recognized at the time of the adoption of the Constitution. Wigmore on Ev. Secs. 1395-1398. It cannot be thought that the Constitution was intended to close the door to the legislative department of government to establish new public records with like probative value. Existing public records did not become rigid for all time for evidential purposes. Power to add to the varieties of public records under the principles of law prevailing at the time of the adoption of the Constitution is conferred upon the General Court under the grant to make, ordain and establish all manner of wholesome and reasonable laws not repugnant to the Constitution. There is analogy in this respect to the trial by jury preserved in all its essentials by the Constitution, which may be regulated by the Legislature as to details not impairing its essential integrity. * * *"

Similarly, in the case at bar, there was received in evidence the record of a public officer, made pursuant to statu-

tory mandate, which record was a statement of autopsy findings.

It will be noted that, in the case at bar, so much of the report of the autopsy findings, filed by the Medical Examiner, as sets forth his conclusion or opinion as to the cause of death, was eliminated from the report as offered in evidence.

As was stated by the Appellate Division of the Supreme Court of the State of New York, First Department, in its opinion, affirming the judgment of conviction of the petitioner:

> "An autopsy made by a skilled pathologist in the performance of his official duties showing primary facts found creates little risk of inaccuracy and would seem to be in that class of public records usually deemed admissible as such."

People v. *Nisonoff*, 267 App. Div. 356, 370.

CONCLUSION

It is respectfully submitted that there has been no violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and, accordingly, the application for a writ of certiorari should be denied.

Dated: New York, June 30, 1945.

Respectfully submitted,

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APPENDIX

END OF

A CASE